Infrastructure Planning

Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

Immingham Eastern Ro-Ro Terminal DCO Application

Issue Specific Hearing 3 (ISH3) on the DCO

Post Hearing Submissions (including written submissions of oral case)

of

CLdN Ports Killingholme Limited

CONTENTS

1. INTRODUCTION

1.1 This document summarises the main oral submissions made by CLdN Ports Killingholme Limited (**CLdN**) at Issue Specific Hearing 3 (**ISH3**) dealing with the Need Case and Environmental and Policy Considerations held on 27 and 28 September 2023, in relation to the application for development consent for the Immingham Eastern Ro-Ro Terminal (**IERRT**) by Associated British Ports (the **Applicant**) (**the Proposed Development**).

1.2 ISH3 was attended by the Examining Authority (**the ExA**), the Applicant, CLdN, and a number of other Interested Parties (**IPs**).

1.3 This document does not purport to summarise the oral submissions of parties other than CLdN, and summaries of submissions made by other parties are only included where necessary in order to give context to CLdN's submissions in response.

1.4 The structure of this document generally follows the order of items as they were dealt with at ISH3 set out against the detailed agenda items published by the ExA on 19 September 2023 (the **Agenda**). Numbered items referred to are references to the numbered items in the Agenda. Where post hearing notes have been added, those notes are prefixed with "Post-Hearing Note" and set out in italics for clarity.

2. **WRITTEN SUMMARY OF CLDN'S ORAL SUBMISSIONS**

Agenda Item	**Applicant's Response**
Item 1	
Welcome, introductions and arrangements for the Issue Specific Hearing 3 (ISH3)	**Rose Grogan, for CLdN,** did not make any submissions in relation to this agenda item.
Item 2	
Policy, statutory and other legal considerations for the Proposed Development The ExA will ask the Applicant and participating Interested Parties (IPs) to present their cases relating to: a) The extent to which any unutilised capacity at the Port of Killingholme is capable of being considered as a potential alternative to the Proposed Development in policy terms.	**Rose Grogan, for CLdN,** made two introductory points in proposing to answer the first question of agenda item 2. First, **Ms Grogan** said that, as set out at Issue Specific Hearing 2 (**ISH2**), CLdN is here to assist ExA in carrying out its assessment of the case for the Proposed Development. CLdN has been painted by the Applicant as an anti-competitive, commercial objector that can be dismissed, but that fundamentally misunderstands CLdN's case. That is not why CLdN is here. CLdN is not in the least behaving anti-competitively and CLdN takes that mischaracterisation of its motives very seriously and thoroughly disputes it. **Ms Grogan** emphasised that the central tenet of the Applicant's justification for the Scheme is that there is no capacity for forecast growth in Ro-Ro freight at the Port of Killingholme. It is very concerning to CLdN as a business that the Applicant's case is advanced on that basis because it is factually untrue. CLdN has explained to the ExA in its Written Representation **[REP2-031]** that capacity is not constrained. Its case is based on objective and empirical operational data and knowledge of its own operations. As **Ms Grogan** explained to the ExA in ISH2, CLdN is best placed to provide the ExA with an assessment of capacity at the Port of Killingholme because it runs the terminal and runs its own shipping line. The Applicant is not a shipping line and does not operate similar terminals anywhere in the UK. **Ms Grogan** continued that, instead of engaging with CLdN's case, the Applicant has in response made a series of peripheral points but does not engage with the substance of CLdN's position. The Applicant challenges CLdN's attendance in an aggressive manner in their written material, particularly in their response to CLdN's Written Representation, but they could have actually engaged with CLdN's submissions to understand what the true position is with regard to capacity at the Port of Killingholme. **Ms Grogan** emphasised that the ExA saw some of that in the Accompanied Site Inspection (**ASI**) held on 26 September 2023. **Ms Grogan** added that the Applicant's whole approach shows a lack of rigour and understanding. It is not enough to look at google maps and assert that there is insufficient capacity. The Applicant has simply not demonstrated any understanding of how Ro-Ro freight operations work, how they can be adjusted to flex available storage and where the opportunities for expansion are.

	Ms Grogan emphasised that this point is also illustrated by the Applicant's approach to dwell times. CLdN has explained what the actual average dwell times are at the Port of Killingholme and DFDS has given an indication, but the Examination has not had similar information from Stena. No one has explained why that is and CLdN has just been told that the Applicant's consultants are satisfied that they have used an appropriate dwell time. The whole exercise reveals a blustering lack of rigour in the approach to justifying the Proposed Development. CLdN is here to ensure that the justification for the scheme is considered on the correct factual basis. Moving to the second introductory point, **Ms Grogan** stated that, once the ExA start from the correct factual basis, the nature of the Proposed Development becomes clear. This scheme is not providing anything new to the market. It is a significant amount of development in an already very busy river to meet the preferences of one operator moving from the Port of Killingholme to the Port of Immingham. So, it is taking provision from one location and moving it to another. CLdN's case is that it is not a sustainable development contemplated by the NPS for Ports. Once an accurate picture of what is being proposed is revealed, the justification for the scheme does not add up. **Ms Grogan** highlighted that against CLdN's case, it is said that none of this matters because there is no policy or legal requirement to establish need for the development. The Applicant's position is that ABP has decided to build this port and therefore CLdN cannot challenge the need case. The ExA has been told that CLdN has distorted the NPS position, but this is not the case at all. The NPS states that there is a general qualitative need and that there is a presumption in favour of development. The NPS does not tell you what weight to give to the need identified in the NPS. That is where alternatives and the weight of the Applicant's need case come into play and is all a matter for planning judgement by the ExA. That principle is well established in the case law. It comes from *R (on the application of Scarisbrick) vs Secretary of State for Communities and Local Government* [2017] EWCA Civ 787. In that case the NPS for hazardous waste infrastructure established a general qualitative need for development. It did not set any particular quantity of the development and it was argued that essentially the greater the scheme, the greater the need, the greater the weight in the planning balance. The court rejected that argument and explained (in paragraph 31) that: "The need identified and established in the policy must be given appropriate weight in the making of a decision on an application for a development consent order, but it will not necessarily carry decisive or even significant weight when the planning balance is struck. The weight to be given to that need, case by case, is not prescribed, either in the policy in section 3.1 or elsewhere in the NPS. It will not necessarily increase with the scale or capacity of a particular proposal. The policy does not place a "trump card" or a "blank cheque" in the hands of a developer. Nor does it provide the Secretary of State with "carte blanche" to grant consent, without carrying out a proper balancing exercise in which the need identified and established in the policy is given the weight it is due in the decision on the project in hand, no more and no less." **Ms Grogan** explained that here lies the Proposed Development's alleged ability to meet an alleged urgent need advanced as one of the key benefits of the scheme. This can be seen in the Planning Statement *(see concluding sections of the Planning Statement in pages 77/78)*. Part of the justification for the scheme is also that it is the only location where this need can be met. So, in examining the Proposed Development, CLdN's case is that the ExA does need to look at what is actually proposed and on what basis. That is why CLdN says that this factual accuracy

	is important. The reality is that there is not a compelling justification for the scheme, it is really just moving existing operations from one location to another. All of that background, CLdN submits, is relevant to the question of whether or not alternatives are relevant and required to be considered as a matter of law. **Ms Grogan** stated that CLdN's case is advanced on three bases: • The NPS says that the relevance of alternatives are a matter of law (4.9.1 of the NPS). CLdN's case is that alternatives are, here, a mandatory material consideration as a matter of law. The Proposed Development falls into the exceptional categories of cases where alternatives are so obvious that they *require* consideration. That is because the IERRT gives rise to substantial planning harms and yet a compelling need and an absence of alternatives are advanced as one of the key justifications for the scheme. • Alternatively, the ExA and the Secretary of State (SoS) as decision-makers are not precluded from looking at alternatives in the exercise of their planning judgement if they consider them to be relevant. It arises as an 'important and relevant matter' to the decision as set out in s.104(2)(a) PA 2008. Also, to the extent the ExA may consider that section 104(7) applies where they are satisfied that they do not need to decide the Application in accordance with the NPS because the ExA are satisfied that the adverse impact would outweigh its benefits. In essence, even if not mandatory as a matter of law, the ExA has a broad discretion in the exercise of its planning judgement and the statutory scheme permits the ExA, as does the policy, to consider alternatives. • If and to extent that on the advice of NE, the ExA (and ultimately the Secretary of State) concludes that an adverse effect on integrity on any of the relevant protected sites cannot be ruled out, there is obviously a legal need to show an absence of alternatives before the Secretary of State can rely on imperative reasons of overriding public interest for granting consent (IROPI). Natural England has outstanding requests for information and the point has not yet been reached where it can be said that an adverse effect on integrity on any of these protected sites can be ruled out. There is certainly a possibility that justification for a derogation may be required. **Ms Grogan** then said that in 4.9.1 of the NPS it says that: "In any planning case, the relevance or otherwise to the decision-making process of the existence (or alleged existence) of alternatives to the proposed development is in the first instance a matter of law, detailed guidance on which falls outside the scope of this NPS. From a policy perspective this NPS does not contain any general requirement to consider alternatives or to establish whether the proposed project represents the best option." **Ms Grogan** explained the ExA is then directed to look at the law. The legal principles are well established on alternatives. The starting point is that alternatives are generally not relevant but in exceptional circumstances it may be necessary to consider them. To that extent, there is no disagreement between CLdN and the Applicant that it is

	required to set up exceptional circumstances in this case. CLdN is not saying the law is different or misrepresenting the conclusion of the *Stonehenge* judgment on the law in that respect. That is the principle and CLdN says that this development falls inside that principle. Moreover, there is a distinction in the relevant case law between (1) where alternatives are so obviously important that they become a mandatory material consideration, meaning it is an error of law not to consider them; and (2) where it is not mandatory, but the decision-maker *can* lawfully take alternatives into account if it considers that they are relevant. Looking at the first category in particular, **Ms Grogan** added that case law gives some help on where "exceptional circumstances may arise". In *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P&CR 293, which was a case about the development of a hotel in a green belt, the Secretary of State concluded that the general need for hotel accommodation could be accommodated elsewhere by the normal operation of market forces. The error alleged was that the Secretary of State concluded that the general need for hotel accommodation in Bristol could be met elsewhere through the operation of market forces and it was argued that this was unlawful. The Court held that the Secretary of State was entitled to take that reasoning into account. The Court's judgment sets out the key principles: • The Court referred to the older case of *Rhodes v Minister of Housing and Local Government [1963] 14 P&CR 122*, which stated that where there are clear planning objections to development upon a particular site it may be relevant and indeed necessary to consider whether there is a more appropriate alternative site. This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it. • Examples in the *Rhodes* case were given of nationally/regionally important sites, e.g. airports, nuclear power stations, i.e. the categories of development that are now NSIPs. In contrast to, e.g., residential development. • To those principles in *Trusthouse* the Court added that where planning objections are sought to be overcome by reference to need, the greater those objections, the more material will be the possibility of meeting that need elsewhere. • Generally speaking, it is desirable that the decision-maker should identify and consider that possibility by reference to specific alternative sites, but it is not always essential or indeed necessarily appropriate to do so. *Trusthouse* was cited, approved and followed in *Derbyshire Dales District Council v SSCLG.* In this case, the Court confirmed that there are two types of cases: one where alternatives are so relevant that they are mandatory and one where it is not an error for the ExA to take them into account. In the former case, account of alternatives will be required if law or policy says the ExA has to and where it is so obvious that the existence of the alternative becomes a mandatory material consideration. The example given in *Derbyshire* was where the development is bound to have significant adverse effects and where the major argument in support of the application is that the need outweighs

	planning objections. In the second case, the ExA are not precluded from taking into account the existence of an alternative if they consider it relevant. The question of whether to do so and how to do it, including the extent to which the alternative is to be worked up and the level of detail that needs to be considered, is a matter of planning judgement for the decision-maker. The questions the decision-maker must consider are: What are the potential adverse effects of the development? How significant are they? What is the planning harm? Where all of those considerations are said to be outweighed by a compelling need and the absence of any alternative location in which to place the development, that is where the ExA gets into the territory of a mandatory material consideration, i.e. that an alternative is so obvious that it must be taken into account. **Ms Grogan** emphasised that all of the above cases were cited in *Stonehenge,* where the conclusion of the judge was that it was the type of exceptional case where alternatives became mandatory. The Applicant's case, as set out in its response to CLdN's written submissions is that CLdN has misunderstood *Stonehenge,* but that is not right. All of these cases are fact sensitive and CLdN accepts that. The ExA has got to look at what the harms are and how the justification for the scheme has been advanced. Yes, *Stonehenge* was very exceptional on the facts, but Mr Justice Holgate endorsed the general principles set out above and took a similar tour through the case law. It is wrong for the Applicant to suggest that *Stonehenge* is so exceptional that you have to get to a level of building a tunnel through a World Heritage Site before alternatives are mandatory; that is not what the case law said. It is simply whether or not there are exceptional circumstances and CLdN says that applies here. **Ms Grogan** stated that the Applicant is asking the ExA to recommend grant of a development consent order (DCO) on the basis that the IERRT will meet "a very clear and compelling need, the meeting of which is strongly in the public interest" (from the Planning Statement at 9.24) and "the location of the proposed IERRT development has been identified as the only location available to meet that need". That is the Applicant's case and CLdN submits that is factually wrong. It is clearly highly material and important that the ExA proceeds on the correct factual basis. The fact that there is not such a compelling need and that there is an alternative to meet the general need established by the NPS and sensible growth forecasts is so obvious that it is a mandatory material consideration. **Ms Grogan** added that the alternative advanced by CLdN is credible, it is not inchoate or speculative. It is simply continuing as the market currently operates which is that the operator of Ro-Ro freight terminal capacity in the area is able to flex and expand its capacity to meet demand as it arises. CLdN has explained in its Written Representations **[REP2-031]** how it can use land efficiently to increase storage capacity. It is something the ExA saw at the Accompanied Site Inspection on 26 September and further details of this will be provided in due course. **Ms Grogan** continued in saying that the IERRT does give rise to conspicuous and substantial harms: those are to be discussed at other agenda items but in particular, the navigational safety issues that arise and the impact on protected sites and transport effects all add up to such conspicuous planning harms that the fact that a compelling need is being advanced as the principal reason why the Proposed Development should go ahead, means that the ExA is required, or at least entitled, to investigate whether the need can be met elsewhere. CLdN submits that it is so obvious that there is a less harmful way of doing this that the decision-maker is required to take it into account. Alternatively, the ExA is perfectly entitled by policy and law to take it into account and weigh it in the planning balance either as a relevant consideration or through the operation of s.104(7) PA 2008. Of course, if an adverse

	effect on integrity of the relevant protected sites cannot be ruled out, it becomes relevant as a matter of law in any event. In looking at the NPS, **Ms Grogan** highlighted that it provides guidance on how to weigh the alternatives and the assessment principles that a decision-maker should follow. Paragraph 4.9.3 of the NPS is said to apply where there is a legal requirement to consider alternatives and **Ms Grogan** outlined the guidance provided on how to weigh the alternative in the planning balance along with CLdN's case for each point: i. <u>the consideration of alternatives in order to comply with policy requirements should be carried out in a proportionate manner</u> – This goes to the ExA's question of what extent can CLdN's expansion ability be considered an alternative in policy terms. CLdN does not need to come to the ExA with a specifically worked up detailed plan for exactly how it will meet the need. It is a very basic and simple point which is that the way the market works at the moment on the Humber is that you can flex and sweat your asset in order to meet fluctuations in demand or projected growth in demand over the next 10 or 20 years. CLdN's case is that can continue. There is no barrier to that continuing and, as Volterra LLP (**Volterra**), CLdN's economic consultants, have set out in their report, if the ExA takes sensible growth forecasts and the ExA looks at the capacity available at CLdN's site, capacity will not be exceeded at CLdN; ii. <u>whether there is a realistic prospect of the alternative delivering the same infrastructure capacity (including energy security and climate change benefits) in the same timescale as the Proposed Development</u> – CLdN's case is that it is effectively a continuation of how the market already operates; iii. <u>the decision maker should not reject an application for development on one site simply because fewer adverse impacts would result from developing similar infrastructure on another suitable site, and it should have regard as appropriate to the possibility that other suitable sites for port infrastructure of the type proposed may be needed for future proposals</u> – CLdN is saying that the type of infrastructure proposed does not need to happen with all of the associated disadvantages and harm that comes with it. CLdN submits that no harm at all can arise if the ExA considers this alternative, which is the alternative of the need being met generally in the market elsewhere; iv. <u>alternatives are not among the main alternatives studied by the Applicant (as reflected in the ES) should only be considered to the extent that the decision maker thinks they are both important and relevant to its decision</u> – This is where the factual inaccuracies are important because alternatives were ruled out on the basis that the Port of Killingholme was at capacity. As CLdN has explained, this is simply not right. It is both important and relevant to consider the actual situation, the actual facts and look at the relative advantages of proceeding with the development against the true picture; v. <u>if the IPC, which must (subject to the exceptions set out in the 2008 Act) decide an application in accordance with the relevant NPS, concludes that a decision to grant consent to a hypothetical alternative proposal would not be in accordance with the policies set out in this NPS, the existence of</u>

	that alternative is unlikely to be important and relevant to the IPC's decision – CLdN states that expansion capacity at the Port of Killingholme is consistent with the principles of the NPS because (if required) it is expanding land site capacity in accordance with an existing established use, meets requirements for competition and is an effective and economic use of port development; vi. suggested alternative proposals which mean the primary objectives of the application could not be achieved, for example because the alternative proposals are not commercially viable or alternative proposals for sites would not be physically suitable, can be excluded on the grounds that they are not important and relevant to the decision – CLdN submits that that factor does not apply here. The primary objective of the IERRT is to meet the requirements of the projected growth and that projected growth can be met in another way; and vii. it is intended that potential alternatives to a proposed development should, wherever possible, be identified before an application is made in respect of it. Where, therefore, an alternative is first put forward by a third party after an application has been made, the person considering that application may place the onus on the person proposing the alternative to provide the evidence for its suitability as such, and the applicant should not necessarily be expected to have assessed it – CLdN has provided the evidence in its Written Representation **[REP2-031]** and the information provided to the ExA supported by Volterra's independent assessment of capacity at the Port of Killingholme. In drawing the above together, **Ms Grogan** said the answer to the ExA's question is yes, spare capacity at the Port of Killingholme can be and in fact is, a relevant alternative that the ExA should take into account and that conclusion is supported by both policy and the law. **Subsequent Discussion** Nothing further was added from the other IPs. The Applicant proposed to respond in writing in full to the above submissions but gave a broad response. **James Strachan KC, for the Applicant,** stated that although the ExA was taken to some parts of the NPS by CLdN, the central parts of Government policy on ports and need are covered by the Applicant's submissions. There is a very clear section on the establishment of need by the Government by reference to growth. The Government is explicit in the NPS that in addition to growth, there are two other elements to the establishment of need: resilience and competition. In relation to resilience, the central position per the NPS is that the principle is to have more capacity than is strictly necessary to accommodate growth to provide the necessary resilience. Secondly, in relation to competition, it is emphasised in the NPS that the principle of establishing port development of this kind is to promote, sustain and ensure competition in this sector. Section 3.4.13 of the NPS welcomes and encourages competition. The need case here is a specific need for Stena that they have identified, having been ejected from the Port of Killingholme. **Mr Strachan KC,** argued that there could not have been a better paradigm of a case of need, as expressed by the NPS, in those sorts of circumstances. The whole principle is to provide additional capacity to stimulate competition. The Port of Killingholme may not like that as it is an effect on competition. If one expresses

	the ExA's question in the context of national policy, even if there is any unutilised capacity, it is not an alternative in this Proposed Development. No matter how interesting the extensive citation of case law is, these will not assist in trumping the NPS. The Applicant does not agree with CLdN's assessment of the case law and they will respond in writing to the characterisation of such. The key point, as **Mr Strachan KC** emphasised, is that there are no exceptional circumstances for looking at this suggested unutilised capacity to make this a mandatory material consideration. There has been no proper response to the question of capacity at the Port of Killingholme and if it exists, it is not on offer on commercially acceptable terms to Stena. Even if it were, Stena is entitled to seek alternatives in line with competition. In relation to section 4.9 of the NPS, **Mr Strachan KC** added that the NPS does not contain any general requirement to consider alternatives from a policy perspective. Alternatives can arise in law, in exceptional circumstances, which the Applicant submits is not present here, or in the context where there is a legal requirement where there are adverse effects. Even if the situation arises, the alternative has to be a true alternative. It is not a true alternative for a commercial operator to say that they have got space capacity in principle, when it is not being offered in commercially acceptable terms to Stena. **Mr Strachan KC** referenced CLdN's written responses at BGC 1.6 whereby CLdN states that it is not seeking to put forward the Port of Killingholme as a proposed alternative. **Mr Phillip Rowell, for the Applicant,** added that ABP do not agree with the position set out. There are three elements to the need question that runs throughout the Applicant's case. It is not just about capacity to meet growth. The policy makes it clear that the need for port development refers to growth, resilience and competition. The Applicant's case is not all about capacity. **Mr Anders Peterson, for Stena,** provided background from their perspective on the Stena and CLdN relationship and why discussions broke down. They explained they wanted to establish their own base to freely develop and ensure competition is in place and resilience is in the market. In response to Stena's submission, **Ms Grogan** explained the overarching point is that CLdN's interest is that this Examination is conducted on the right basis. All of the Applicant's points regarding competition and resilience are a helpful concession, noting their original application was advanced on the basis of an urgent and compelling need. If the need is being modified to a lower level now, then CLdN has achieved what it set out to in participating in this Examination. Capacity at the Port of Killingholme is still relevant, however. Further, Stena were not ejected by CLdN, there were other commercial reasons. This all feeds into the planning balance for the ExA. The growth assumptions underpinning the original case of a throughput of 660,000 units per year underpins the benefits case. CLdN has received an indication that this figure is coming down in a proposed DCO change, but there has been no confirmation yet. It would be helpful to know what the actual growth plan is at the Port of Immingham and how that feeds into the argument of need, as CLdN remains in the dark. CLdN is hearing two things: first, that there is an urgent need; and secondly, that the purpose is for competition and resilience. Both of these points are distinct. In response to the alleged inconsistency in CLdN's case made by Mr Strachan KC, **Ms Grogan** confirmed that CLdN is not proposing that the Port of Killingholme is a location for the level of growth that the Applicant is

	suggesting. What CLdN is saying is that the spare capacity at the Port of Killingholme is a relevant consideration for the Examination. ***Post Hearing Note:*** *CLdN notes that the Applicant's case for the Proposed Development throughout the Examination so far has been primarily based around 'need'. Whilst the Applicant has noted that the Proposed Development has beneficial effects in relation to competition and resilience, these have not been advanced as specific reasons, in themselves, for the Proposed Development. For example, paragraph 5.7.9 on page 31 of the Applicant's Statement of Reasons* ***[APP-017]*** *states that "having regard to the Government's assessment of the need for new port infrastructure, the need that has been identified in relation to the IERRT Project meets the three strands that the policy indicates make up the total need for port infrastructure…", of which ensuring effective competition and resilience in port operations is one of these three strands. It continues that "the information presented by ABP in its application documentation demonstrates how the project will contribute to effective competition and resilience, notably in Chapter 4 (Need and Alternatives) of the ES". It is clear from this whether the alleged enhanced competition and resilience (which, in itself, CLdN disputes) is considered by the Applicant to be a beneficial <u>effect</u> of the Proposed Development, and that the specific <u>reason</u> for promoting the Proposed Development remains 'need' alone.* *The Applicant's case at the outset of the Examination was clear: there was an urgent and compelling need for the Proposed Development. During ISH3, and in response from critical questioning on behalf of CLdN of the 'need' case, CLdN notes that the Applicant has appeared to step away from 'need' as the sole reason for the Proposed Development, and instead is now advancing its reasoning based on a combination of need, competition and resilience.* *As CLdN has made clear, the Applicant's case in relation to competition points to a neutral impact, at best. There is also no evidence that there is currently a lack of competition on the Humber. In relation to resilience, there is also no evidence to suggest that there is a current problem with a lack of resilience in the Humber. Resilience, in this context, does not solely concern building more terminals on the Humber – rather, it concerns overall capacity within the UK. Whilst the Proposed Development might have a beneficial effect from a resilience perspective, it is not economically efficient or sustainable given that it is not addressing an existing resilience issue. In addition, the increase in resilience from the Proposed Development only relates to one shipping line (Stena), rather than resilience across the whole market.* *The reasons of competition and resilience latterly advanced to justify the Proposed Development are, therefore (and much like the alleged 'need' case), not compelling.* **Ms Grogan,** in answering the ExA's query, confirmed that, putting aside any commercial considerations, the Port of Killingholme has capacity to provide a facility to meet the needs of Stena. **Mr Anders Peterson** responded that it is impossible for Stena to confirm as there are no commercial proposals on the table and CLdN has not managed to meet Stena's needs since 2017.

	Noting that Mr Peterson failed to put aside the commercial considerations in their response, **Ms Grogan** again confirmed there is space on site to accommodate Stena's demands. **Nigel Castle, for CLdN,** explained that there was a brief period where issues of Brexit meant the Port of Killingholme was under such duress that they were constrained for capacity. CLdN wrote to both shipping lines expressing limits on capacity and how CLdN would limit both of them for storage space. The letter went to both operators explaining the capacity of the port and how this would be split. These issues have subsequently been resolved and capacity has increased since Brexit. ***Post Hearing Note:*** *As per ISH3 Action Point 3* ***[EV6-012]****, the ExA is referred to the separate 'Killingholme Note', submitted by CLdN at Deadline 4, for further detail and information on the Brexit impacts and subsequent developments.* When asked by the ExA to confirm again if there is sufficient space at the Port of Killingholme for Stena to deal with its current operations, **Mr Peterson** said that there is a difference between available space and what space Stena would have for growth. **Benjamin Dove-Seymour, for CLdN,** explained the ExA should distinguish between the two issues: operational issues regarding Brexit and where CLdN is at now. CLdN has made two offers to Stena post Brexit, recognising that there is available space. **Mr Strachan KC** emphasised that the underlying issue between the parties is whether there is meaningful underutilised capacity. Divorcing physical capacity from commercial terms and considerations is at odds with the NPS. The Applicant feels they have not seen any proposals for expansion from CLdN. ***Post Hearing Note:*** *CLdN agreed to provide the ExA with a plan and an explanation of how shipping lines are accommodated at the Port of Killingholme as part of the 'Killingholme Note' referred to above by Deadline 4. All freight is handled as one (i.e. there is no redline boundary per operator), rather than there being certain areas for each operator. The note covers how the terminal works with pictures of land available overall. Additionally, commentary is provided to explain what the conditions were at the time of Brexit, how they have changed and what offers have been made to Stena over time. CLdN has also provided an explanation of what the position is at the Port of Killingholme now. Information on what CLdN has done by way of expansion since the commercial negotiations took place with Stena has also been covered, alongside CLdN's expansion prospects.* *CLdN understands that the Applicant will then provide a written response to the note at Deadline 5.* *In relation to the case law discussion on the ExA's ability and, in some circumstances, requirement to consider alternatives, CLdN notes that the cases following Derbyshire are all consistent with the theme addressed above and in particular:-*

	• *Derbyshire Dales District Council v SSCLG* [2010] 1 P&CR 19*, whereby it was said:* *"17. I have highlighted the words…"relevant and indeed necessary", because they signal an important distinction, insufficiently recognised in some of the submissions before me. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is necessarily relevant, so that he errs in law if he fails to have regard to it.* *18. For the former category the underlying principles are obvious. It is trite and long established law that the range of potentially relevant planning issues is very wide (Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker (Tesco Stores Ltd v Secretary of State [1995] 1WLR 759, 780). On the other hand, to hold that a decision-maker has erred in law by failing to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so."* • *R (Jones) v North Warwickshire Borough Council* [2001] P.L.C.R. 31*, whereby it was held:* "*such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question*" • *R(Langley Park School for Girls) v Bromley LBC* [2010] 1 P&CR 10*, whereby Sullivan J considered:* *"In the Trusthouse Forte case, the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. There is no "one size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc.) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.* *53.Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by*

	the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority." *In accordance with ISH3 Action Point 6* ***[EV6-012]****, please see Appendix 1 for the full judgments of the cases referred to within this post hearing note, as agreed by CLdN and the Applicant.*
b) Whether the Proposed Development would or would not amount to sustainable development for the purposes of the National Policy Statement for Ports. The ExA explained that BGC2.2 from ExQ2 is linked to this question.	**Rose Grogan, for CLdN,** stated that the relevant parts of the NPS are 3.3.1 to 3.3.3. CLdN's case is that the Proposed Development is not a "sustainable port development" as identified in the NPS and Volterra has provided the technical detail underpinning this argument. **Ellie Evans, from Volterra,** stated that Volterra was commissioned to undertake an independent study of the general need for freight capacity in the Humber. Volterra was brought in after CLdN had made their initial relevant representation and it was agreed with CLdN that Volterra would only take the commission if Volterra found the case to be robust. Volterra believe they have undertaken a robust study. It has been claimed in the Applicant's responses that Volterra has simply taken what CLdN has told them to be true. **Ms Evans** confirmed this is incorrect. Volterra have substantiated CLdN's information through both a site visit to the Port of Killingholme and have undertaken an independent review of the raw primary data provided. In relation to the first bullet of 3.3.1 of the policy (*to encourage sustainable port development to cater for long-term forecast growth in volumes of imports and exports by sea)* and having looked at all the information provided, **Ms Evans** explained that it has not been demonstrated whether the Proposed Development caters for any claimed growth. Whether there is a need to cater for long-term forecast growth through a development such as the Proposed Development comes down to two factors: (1) a forecast growth in demand and (2) constraints on existing capacity. On the point of demand, **Ms Evans** said the Applicant has engaged with Volterra's review of the market study's demand forecasts. There was agreement in principle between the two parties that there will be growth in the future, both nationally and in the Humber. The exact level of that future demand is uncertain. The Applicant and Volterra arrive at different levels of forecast demand. The Applicant presents largely one scenario of future demand with certainty, which Volterra do not believe is fair; Volterra aligns with the Secretary of State's approach to freight forecasts and presents a range of demand scenarios to account for uncertainty which is inherent in demand forecasting. Minor disagreements on the level of future demand largely detract from the much bigger issue of contention. **Ms Evans** continued in that the key issue that the Applicant has not constructively engaged with is the calculations to determining the existing capacity, the second point relevant to para 3.3.1. The Applicant's capacity calculations are both factually incorrect and inconsistent (between existing and proposed development capacity). In Volterra's view, there is no capacity constraint on the Humber and therefore no imminent need for the Proposed Development. The really fundamental assumption which underpins this is dwell times. Dwell times are, put simply, the amount of time it takes for goods to move off the ship, sit somewhere in the port, before being moved on. Dwell time therefore determines how much land is needed for those goods to dwell.

	Ms Evans emphasised that the Applicant and CLdN have a big difference in position on dwell times, which is presented and explained in the Volterra report. The Applicant uses a market average dwell time of 2.25 days. That is, despite Volterra raising this as the largest challenge in their report, still not explained or substantiated with any real primary data, instead relying on the general view of their consultants which is not corroborated by any empirical evidence, to state that the Port of Killingholme is at capacity. In contrast, **Ms Evans** explained that CLdN utilises real data collected over a period of 10 years to calculate that dwell times at the Port of Killingholme vary from between 1 to 1.5 days. This is lower than the lowest sensitivity of dwell times presented by the Applicant, of 1.75 days. So, the Port of Killingholme's dwell time is considerably lower. **Ms Evans** added that dwell times are combined with landside storage space to estimate total capacity. The Applicant has estimated existing capacity at the Port of Killingholme using a google maps based methodology that is factually inaccurate. As a result of that, the Applicant assumes that there are 220 container ground slots at the Port of Killingholme, when in fact 893 ground slots are available (accommodating 1,879 containers). Combining these two assumptions results in an underestimate of capacity at the Port of Killingholme by the Applicant of between 64% and 164%, **Ms Evans** stated. Volterra presented in their report the impact this had on the estimates of current capacity. The numbers vary depending on exactly what is assumed, but fundamentally Volterra's scenarios demonstrated that there is no capacity constraint. The Port of Killingholme is not full, far from it in fact. Furthermore, **Ms Evans** added, even if you do not take that position with the Port of Killingholme, there is a fundamental inconsistency in the Applicant's own case. Assuming for a moment that the 2.25 day dwell time can be substantiated, then when applying this dwell time to the Proposed Development it would only be able to achieve an annual throughput of 195,000 unaccompanied units per annum. To achieve the throughput outlined in the draft DCO of 660,000, or the lower figure that is potentially now being stated by the Applicant of 525,000, a dwell time of 0.92 – 1.16 (around 1) days would need to be achieved at the Proposed Development. So, **Ms Evans** confirmed, if the Applicant is right about dwell time, then it is clear that the Proposed Development is unable to: • meet para 3.3.1 of the NPS for Ports, namely that they will be able to cater for forecast growth on the Humber, which is used to justify significant and harmful development; nor • meet para 3.3.3 of the NPS for Ports, namely to deliver a development that is well designed functionally and can deliver on its stated throughput. **Ms Evans** stated that the Applicant cannot claim both dwell times to be true. The Applicant cannot claim both to be true; either the dwell time is 2.25 days, in which case the Proposed Development cannot cater for the demand by accommodating the throughput it claims, or the dwell time is lower which removes the need for the Proposed

	Development because the existing constraint on capacity simply does not exist. This inconsistency fundamentally undermines their whole case. Alternatively, **Ms Evans** added, if the ExA believes Volterra and CLdN's assumptions of demand scenarios and corrected capacity, then it can be shown that in the central, most likely, scenario, capacity is not breached at all in the period to 2050. Even in the worst case, where the more conservative assumptions are taken, capacity is breached much later than the stated 2026 in the market study (2031-2044). The fact that in many of Volterra's revised scenarios demand can be accommodated places significant doubt on whether there is actually a 'need' to expand port capacity of the Humber. In relation to 3.3.3 of the NPS for Ports, **Ms Evans** made the following points:- a) With respect to "contributing to local employment and regeneration", the benefits are again significantly overstated: o The socio-economic assessment lacks credibility and does not follow best practice, with a number of assumptions applied poorly. It does not appropriately account for displacement, nor compare the correct subsectors within geographies. o The Applicant claims that the 176 jobs created at the Grimsby travel to work area level would be a high and beneficial magnitude of impact. This is a 0.2% uplift on the total workforce, a tiny increase. o Reacting to this, the Applicant seeks to change the goalposts and justify the benefit based on a 1.9% uplift on a subsector of the total workforce, seeking to raise the proportional increase. This is an inconsistent and hence fundamentally incorrect comparison, given that not all net additional jobs would be supported in this subsector of employment. o Regardless, in all of **Ms Evans'** years of professional experience, a 1.9% uplift would never constitute a high magnitude of impact under any socio-economic best practice. o This serves to show why the Applicant has also overstated this employment benefit in their case. b) There are different forms of competition on the Humber, relating to both shipping lines and port (i.e. terminal) operations. CLdN owns a shipping line, but it acts independently as a terminal operator in its own right. The Applicant owns two out of the three Ro-Ro terminals on the Humber, which would rise to three out of four with the Proposed Development. The Applicant does not acknowledge this two thirds monopoly they currently hold on the Ro-Ro operations in the Humber. The Proposed Development would give the Applicant more power in the port operations market, with greater potential to exert monopolistic power and influence or control charging rates for shipping lines. It is Volterra's view that the Proposed Development primarily serves to displace one shipping line operation from one terminal to another. The premise still remains; Stena is a shipping line that would be operating within a terminal controlled by a separate commercial (i.e. profit motivated) entity.

	In considering all of this, **Ms Evans** stated that it is Volterra's view that there is no impact upon competition or efficiency. There does not appear to be anything in the Proposed Development that ensures or enhances competition. The impacts are neutral, rather than beneficial. In response to Ms Evans' submissions, **Mr Strachan KC** stressed that CLdN has not addressed the question at hand because, when considering policy, demonstrating capacity is not relevant to sustainability. The ExA summarised the IPs' various positions and **Ms Grogan** confirmed their summary of CLdN's position was correct, i.e. that CLdN has a higher level objection, looking at the wider issues of which sustainability concerns come into play. **Ms Grogan** confirmed that CLdN has drawn into their case the ecological impacts of the Proposed Development and CLdN supports, but does not advance their own case to avoid duplication, the safety and sustainability points made by the other IPs. **Ms Grogan** stated that, following the above, the consequence of the Proposed Development not being "sustainable development" is, therefore, that it should not benefit from the presumption in the NPS in favour of granting the DCO. **Ms Grogan** noted that CLdN agrees with the submissions made by DFDS in relation to this point. ***Post Hearing Note:*** *CLdN maintains its objection on the grounds that there is a fundamental disconnect between the "imperative" and "urgent" need that the Applicant identifies, and the proposition put forward that the Proposed Development represents an effective and efficient (and indeed the only) way of addressing that perceived need. The Proposed Development does not meaningfully address the need that is identified in the NPS. It is not a "sustainable port development".* *Sustainable development is well-understood in planning terms to mean that you are meeting the needs of the present without compromising the ability of future generations to meet their own needs (NPPF 7).* *In context of this Proposed Development, CLdN submits that the development has to relate to the identified need and must do so in a way that is sustainable, i.e. do no more harm than is needed to meet that need identified.* *In relation to what is actually being proposed, there is a large amount of infrastructure with all of the associated impacts and harms, but it is not clear at all how this responds to the general need for port development or the specific need of forecasted growth in Ro-Ro on the Humber. CLdN says that this is not "sustainable development". It is all being done in order to pursue the operational preferences of one operator who is already being served in the area and in circumstances where nobody has demonstrated that its operations can grow to meet the alleged need.* *In fact, CLdN maintains its view that the Proposed Development is not well designed functionally, as is required by the NPS (para 3.3.3). Based on the Applicant's stated average dwell time (2.25 days), it has been clearly shown*

	that the Proposed Development cannot meet its own stated throughput of either 525,000 or 660,000 units. With this dwell time, the Proposed Development would only be able to service 195,000 unaccompanied Ro-Ro units per year, substantially reducing the benefits related to meeting a need that the Applicant makes central to their case. *CLdN's case in summary is as follows:-* *1. CLdN agrees that the starting point is the presumption in favour of development and that need is established.* *2. It is also clear that the ExA have to weigh need in the planning balance, as said in the Scarisbrick case:* • *Para 31: "The weight to be given to that need, case by case, is not prescribed, either in the policy in section 3.1 or elsewhere in the NPS. It will not necessarily increase with the scale or capacity of a particular proposal. The policy does not place a "trump card" or a "blank cheque" in the hands of a developer. Nor does it provide the Secretary of State with "carte blanche" to grant consent, without carrying out a proper balancing exercise in which the need identified and established in the policy is given the weight it is due in the decision on the project in hand, no more and no less."* • *Para 24: : "The need it identifies is a general need. It establishes what might be described as a "qualitative" need for hazardous waste infrastructure of the relevant types. It does not define a "quantitative" need for such development, by setting for each relevant type of infrastructure an upper limit to the number or capacity of the facilities required. It does not descend at all into the question of capacity, in the sense of the requirement for a given level of throughput of hazardous waste in infrastructure of the relevant types. It creates, at the level of national policy, a general assumption of need for such facilities. The need is not explicitly for an individual project of any particular scale or capacity or in any particular location. But the policy does not exclude any project of a relevant type. It applies to every relevant project capable of meeting the identified need, regardless of the scale, capacity and location of the development proposed. An applicant for a development consent order is entitled to proceed on that basis."* *3. CLdN submits that the relevant material factors going to weight are:-* *i. Extent of compliance with requirement for sustainable development;* *ii. Extent of the benefits and weight to be given: in that context the ExA have been told there is an urgent and imperative need and the significant benefit from this proposal is meeting that need. This is not some invention of CLdN, it is how the Applicant has sought to justify its application for consent and is a golden thread throughout its application. Other benefits (employment and competition) have also been shown to be overstated in their case;* *iii. The Applicant wants to build significant infrastructure catering for a significant proportion of forecast growth (in circumstances where they are already the dominant Ro-Ro terminal operator in the area)*

	but have not substantiated their proposal on the basis of credible information and data. It is based on simple factual inaccuracies; and *iv. Availability of alternatives.* *As per ISH3 Action Point 5* ***[EV6-012]****, CLdN agreed to prepare a SoCG regarding dwell times with Stena and DFDS in a working group also involving the Applicant, clearly setting out the differences in baseline capacity and assumptions between the parties. The statement will explain the scope of the assessment, what external factors influence dwell times and what any differences in the assumptions would mean.*
c) Compliance or otherwise with the UK Marine Policy Statement (2011) and the East Inshore and East Offshore Marine Plans 2014.	**Rose Grogan, for CLdN,** stated that CLdN has reviewed the Marine Policy Statement and Marine Plans and they refer to broad aims of ensuring efficient and economic marine industry so in that regard are consistent with the NPS. It all feeds into CLdN's overarching point. CLdN agreed with the points made in the hearing by the other IPs in relation to this agenda item. **Ms Grogan** also noted that there are specific policies in the East Inshore and East Offshore Marine Plans 2014 which relate to navigational safety but that those points are for others.
d) Any national energy security considerations.	**Rose Grogan, for CLdN,** did not make any submissions in relation to this agenda item.
Additional points raised by ExA on Agenda Item 2	**Rose Grogan, for CLdN,** explained that Regulation 6(3) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 provides that: "if the application is for the construction or alteration of harbour facilities, it must be accompanied by a statement setting out why the making of the order is desirable in the interests of (a) securing the improvement, maintenance or management of the harbour in an efficient and economical manner or (b) facilitating the efficient and economic transport of goods or passengers by sea or in the interests of the recreational use of sea going ships". That is the regulatory requirement that triggers the need for a harbour statement that has been provided in section 5 of the Applicant's planning statement. To the question of what use should the ExA put to the information in that statement, CLdN sets out, in its Written Representation **[REP2-031]** at paragraph 6.2.3 that it is a relevant and important matter for the ExA's consideration that the ExA is entitled to take into account. The information in the statement, whether it is right and what weight the ExA should put on that information, are matters CLdN says are relevant and important to the ExA's consideration of whether or not development consent should be granted. **Ms Grogan** added that the difference between CLdN and the Applicant, is that the Applicant's position is that they have provided the statement and have set out their case and that is the end of it. CLdN's position is that the ExA needs to take that information into account and scrutinise it for the planning balance. Therefore, the question of whether the Proposed Development is economic or efficient is a live question for investigation in the Examination. Otherwise, it does not make any sense as a procedural requirement – there is no reason why Parliament would make this a requirement if the ExA is not supposed to do anything with it.

	Post Hearing Note: *At the hearing, it was submitted on the Applicant's behalf that the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (the **APFP Regulations**) do not provide a separate route to challenge the case advanced by the Applicant on need. That submission does not reflect the clear structure of the PA 2008.The ExA (and ultimately the Secretary of State) are expressly required to have regard to, among other things, (1) any extant NPS (see s.104(2)(a)); (2) any matters prescribed in relation to development of the description to which the application relates (see s.104(2)(c)) (of which the APFP Regulations would be a "matter prescribed") and; (3) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision (see s.104(2)(d)).* *Section 104(3) then sets out that the decision must be made in accordance with the NPS unless sections 104(4)-(8) apply. In deciding an application in accordance with the NPS, as the Examining Authority must do, that does not prevent the decision-maker from considering the matters set out at s.104(2), including information supplied in response to requirements of the APFP Regulations as a "matter prescribed", taking them into account and weighing them in the overall balance. For the avoidance of doubt, CLdN's case is not that the NPS policy on need should be disregarded because the development is not "desirable" as set out in the APFP Regulations. CLdN's case is that the fact that IERRT is not "desirable" harbour development is a factor to be weighed in the balance and is capable of reducing the weight to be given to the general need for development established by the NPS as it applies to this scheme. By way of illustration, the policy need should be given reduced weight in this case for all of the reasons given in CLdN's submissions and representations, including the fact that the development is not "desirable" harbour development.*
Item 3	
Navigation and shipping effects of the Proposed Development The ExA will ask the Applicant and participating IPs and the Harbour Master Humber questions related to the following matters: a) The management of an allision or collision incident within the Port of Immingham by the Dock Master and the Harbour Master Humber.	**Rose Grogan, for CLdN,** emphasised that CLdN would want to be present for any further simulations carried out by the Applicant and to be considered in relation to points made in the Examination in relation to any of those further simulations. ***Post Hearing Note:*** *CLdN has agreed to provide information on the distances between petrochemical apparatus and the CLdN Ro-Ro facility at Purfleet by Deadline 4 (ISH3 Action Point 12 **[EV6-012]**) and CLdN refers to its Responses to ExQ2 for this information.* *As per ISH3 Action Point 17 **[EV6-012]**, it is acknowledged that the Applicant will engage with CLdN, DFDS and IOT Operators to agree parameters for the undertaking of additional simulations to address the concerns with respect to the Proposed Development's proximity to the Eastern Jetty, including the effects of current direction on the approach to the proposed berths 2 and 3.*

b) Any examples of any port layouts in the United Kingdom where Ro-Ro berths and fuel import/export berths have siting relationships comparable to what is being proposed for the Port of Immingham. c) Differences in approach taken by the Applicant, IOT Operators and DFDS in preparing their respective Navigational Risk Assessments (NRA) [APP-089], [REP2-064] and [REP2-043] and the consequent implications for the conclusions reached in those NRAs about risk controls and acceptability. D) Operating limits and harbour directions for the proposed IERRT berths and how they might change over time. e) The identification of risk controls and why potential controls identified by IPs either prior to the applicant's submission or during the Examination, such as the full or partial relocation of the IOT Finger Pier berths, have been discounted by the Applicant, including the consideration of cost and effectiveness. f) Harbour Authority and Safety Board (HASB) consideration on 12th December 2022 of the Proposed Development risk acceptability (tolerability) and the	

cost effectiveness analysis of controls.	
Item 4	
Onshore transportation The ExA will ask questions of the Applicant and IPs participating in this agenda item concerning: a) Ro-Ro unit dwell times, predictions for the split between accompanies and unaccompanied freight and the freight handling capacity for the Proposed Development.	**Rose Grogan, for CLdN,** stated in relation to the draft SoCG that matters are moving and some progress has been made. CLdN's transport expert is working with the other parties on the three-way SoCG but it is noted that some matters remain outstanding. The detailed terminal assessment is to be submitted by the Applicant by Deadline 4. CLdN notes the suggestion by the Applicant that the annual throughput figure may be reduced but CLdN has not received any details of this so far. CLdN would appreciate some clarity on this matter. In response to the ExA's question on the data provided in relation to the sensitivity on accompanied and unaccompanied freight testing, **Ms Grogan** confirmed that CLdN's transport expert was listening to the hearing and has confirmed that the data is correct. The SoCG in relation to transport is a separate exercise to the dwell times. The dwell time point needs to be resolved as quickly as possible so that the transport team can take this into account.
b) Road traffic surveys and predicted traffic generation.	**Rose Grogan, for CLdN,** did not make any submissions in relation to this agenda item and noted that CLdN agrees with DFDS' response.
c) Distribution of vehicular traffic entering and exiting the Port of Immingham in association with the operation of the Proposed Development.	**Simon Tucker, for the Applicant,** provided a summary of negotiations with the IPs. From the Applicant's perspective, they still consider that the case and distribution established in the report remains robust and appropriate to assess the Scheme. 85% of the traffic uses the East Gate. East Gate is the quickest and most logical route for traffic to gain access to the SRN. The West Gate route is tortuous as it requires going through three roundabouts and one priority junction. There are a significant amount of facilities accessed from the East Gate, hence the 85% figure. **Mr Tucker** noted that there is a technological way of directing people through the use of booking systems. DFDS stated that the habits of drivers using the A160 to access the Port of Killingholme means the transition from one corridor to another would be a substantial change of behaviour, potentially requiring controls. There are facilities around the A160 including depots and other centres that have not been considered by the Applicant. **Rose Grogan, for CLdN,** said CLdN agrees with DFDS' point. CLdN has heard a difference in the optimism between the Applicant and DFDS and whether the 15% for the West Gate is justified. An answer would be to provide a sensitivity assessment and CLdN believes this would be sensible for the Applicant to provide. ***Post Hearing Note:*** *CLdN is aligned with DFDS' point in relation to this agenda item.*

	CLdN believes a valid sensitivity assessment should be submitted by the Applicant to give confidence that fluctuations in HGV distribution patterns have been assessed and mitigated.
d) Effects for the operation of the public highway and whether there is any need for mitigation and what form any such mitigation might take.	**Rose Grogan, for CLdN,** did not make any submissions in relation to this agenda item.
e) Any implications for the operation of the rail network.	**Rose Grogan, for CLdN,** did not make any submissions in relation to this agenda item.
Item 5	
Any effects for the integrity of the Humber Estuary Special Area of Conservation, Special Protection Area and Ramsar site (the designated sites) The ExA will ask the Applicant to give an update on any progress being made to address the representations raised by Natural England and Marine Management Organisation in their respective Relevant Representations [RR-015/AS-015/AS-017 and RR-014] and their subsequent Examination written submissions. [It should be noted that any matters relating to the drafting of the draft Development Consent Order will be considered during ISH4 rather than as part of this hearing.] The ExA will then invite any other IPs participating in the discussion of this agenda item to raise any matters they may	**Rose Grogan, for CLdN,** stated that CLdN notes that discussions with the Applicant and Natural England and Marine Management Organisation are ongoing and waits the Applicant's written submissions on the status of these negotiations. ***Post Hearing Note:*** *CLdN retains concerns that the Proposed Development could cause significant and irreversible damage to marine ecological receptors, biodiversity and protected habitats. It recognises, however, that it is principally the role of Natural England (as the Secretary of State's statutory adviser on conservation matters) to comment and advise on compliance with the tests under the Conservation (Natural Habitats, &c.) Regulations 2010.* *As set out in CLdN's Written Representation **[REP2-031]** at pages 16 and 17, CLdN is aware that discussions are continuing between the Applicant and Natural England as to the provision of information in order to seek to demonstrate compliance with the statutory tests. CLdN notes from the Principal Areas of Disagreement Summary Statement submitted by Natural England at Deadline 1 **[REP1-022]** and also its Written Representation **[REP2-019]** that a number of matters have yet to be resolved with respect to potential adverse impacts on internationally and nationally designated sites. CLdN makes no further comment at this time beyond highlighting that:* • *it is incumbent on the Applicant to demonstrate to the satisfaction of the Secretary of State (as "Competent Authority") that the Proposed Development will not have an adverse effect on the integrity of the Humber Estuary SPA, SAC and Ramsar Site; and* • *it seeks assurance that the above-noted matters raised by Natural England relating to overall impacts and interactions will be further considered and fully addressed.* *CLdN notes that the Applicant confirmed in its Response to Natural England's Written Representation **[REP3-014]** that an updated Habitats Regulations Assessment is to be submitted at Deadline 5 on 23 October. CLdN reserves its position until this has been submitted and it has had an opportunity to consider the updates therein.*

relating to any effects the Proposed Development might have for the Designated Sites. The ExA will then ask any questions it may have in respect to the cases made by the Applicant and other IPs.	
Item 6	
Any Other Business The ExA may extend an opportunity for the Applicant and IPs to raise matters relevant to topics raised ISH3 that they consider should be examined.	**Rose Grogan, for CLdN,** did not make any submissions in relation to this agenda item.
Item 7	
Review of matters and actions arising The ExA will discuss how any actions arising from the discussion during ISH3 are to be addressed by the Applicant, IPs or Other Persons following this hearing and whether there is any need for procedural decisions about additional information or any other matters arising. A written action list will be published if required.	**Rose Grogan, for CLdN,** did not make any submissions in relation to this agenda item. ***Post Hearing Note:*** *CLdN has reviewed the Applicant's draft actions list and provided comments.*
Close	

3. **APPENDIX 1**

FULL JUDGMENTS OF CASES REFERRED TO THROUGHOUT ISH3, AS AGREED BETWEEN CLDN AND THE APPLICANT

Case List

Neutral Citation Number: [2017] EWCA Civ 787

Case No: C1/2016/0761

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE CRANSTON
CO/3070/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2017

Before:

The Senior President of Tribunals
Lord Justice Lindblom
and
Lord Justice Irwin

- -

Between:

R. (on the application of Arthur Scarisbrick)	**Claimant**
- and -	
Secretary of State for Communities and Local Government	**Defendant**
- and -	
Whitemoss Landfill Ltd.	**Interested Party**

Mr David Wolfe Q.C. (instructed by **Leigh Day Solicitors**) for the **Claimant**
Ms Nathalie Lieven Q.C. (instructed by **the Government Legal Department**) for the **Defendant**
Mr James Pereira Q.C. (instructed by **Nabarro LLP**) for the **Interested Party**

Hearing date: 2 March 2017

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. In this claim for judicial review we must decide whether the Government's policy for "nationally significant hazardous waste infrastructure" was properly interpreted and lawfully applied in the making of a development consent order under section 114 of the Planning Act 2008.

2. The claimant, Mr Arthur Scarisbrick, has permission to apply for judicial review of the decision of the defendant, the Secretary of State for Communities and Local Government, on 19 May 2015, to make the White Moss Landfill Order. The order granted consent for the construction of a hazardous waste landfill facility with a capacity of 150,000 tonnes per annum, and the continuation of filling with hazardous waste of the adjacent landfill site, known as Whitemoss Landfill, at White Moss Lane South in Skelmersdale. When making it, the Secretary of State confirmed the requisite powers for the compulsory acquisition of land under sections 122 and 123 of the 2008 Act. The applicant for the order was the interested party, Whitemoss Landfill Ltd., the operator of the existing landfill site. The Secretary of State's decision to make it was in accordance with the recommendation made to him in the report, dated 21 February 2015, of the Examining Authority (Ms Wendy Burden, Mr Philip Asquith and Mr Robert Macey), after an examination undertaken between 21 May and 21 November 2014.

3. Mr Scarisbrick owns land next to the site of the proposed development, and lives nearby. With a number of other local residents, who had formed a group called Action to Reduce and Recycle Our Waste ("ARROW"), he objected to the draft order and took part in the examination. His claim challenging the development consent order was issued on 30 June 2015. Permission to apply for judicial review was initially refused in the Planning Court. But at a hearing on 5 October 2016 I granted permission, on a single ground. Because of the possible wider importance of the issue raised, which concerns government policy in the "National Policy Statement for Hazardous Waste: A framework document for planning decisions on nationally significant hazardous waste infrastructure" ("the NPS"), published by the Department for Environment, Food and Rural Affairs in June 2013, I ordered that the claim was to be heard in this court.

The issue in the claim

4. The issue raised in the single ground on which Mr Scarisbrick has permission to apply for judicial review is whether, in making the development consent order, the Secretary of State erred in his approach to the assessment of the need for the project by misconstruing and misapplying the policy in section 3.1 of the NPS, which says that relevant applications will be assessed "on the basis that need has been demonstrated".

The 2008 Act

5. In Parts 3, 4 and 5 of the 2008 Act, provision is made for the granting of development consent for a "nationally significant infrastructure project" – defined in section 14 as including "the construction or alteration of a hazardous waste facility" (subsection (1)(p)). Under section 30 a "hazardous waste facility" is within section 14(1)(p) only if it will be in England (subsection (1)(a)), and, "in the case of the disposal of hazardous waste by landfill or in a deep storage facility", its capacity is "more than 100,000 tonnes per year" (subsections (1)(c) and (2)(a)). Section 37 provides for the making of an application for a development consent order.

6. Section 5, "National Policy Statements", provides that the Secretary of State may issue a national policy statement that "sets out national policy in relation to one or more specified descriptions of development" (subsection (1)(b)). Section 5(5) provides that a national policy statement may, among other things, "set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area" (subsection (5)(a)); "set out criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development" (subsection (5)(b)); "identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development" (subsection (5)(d)). Section 5(7) provides that "[a] national policy statement must give reasons for the policy set out in the statement". Section 6(1) requires the Secretary of State to "review each national policy statement whenever [he] thinks it appropriate to do so", and, if there has been "a significant change in any circumstances …" (section 6(3)(d)). Section 9 requires a proposed national policy statement to be laid before Parliament before it is designated and takes effect. Section 13, "Legal challenges relating to national policy statements", provides for "proceedings for questioning a national policy statement …" to be brought by a claim for judicial review within six weeks of its designation or, if later, its publication (subsection (1)).

7. In Part 6, "Deciding Applications for Orders Granting Development Consent", section 103 provides that the Secretary of State "has the function of deciding an application for an order granting development consent". Section 104, "Decisions in cases where national policy statement has effect", applies to "an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates" (subsection (1)). It provides, in subsection (2), that "[in] deciding the application the Secretary of State must have regard to "(a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement") …". Subsection (3) states that "[the] Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies". Subsection (7) applies "if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits". Under section 114(1) the Secretary of State must either make the order granting development consent or refuse it. Section 118 requires a challenge to a development consent order to be made by a claim for judicial review.

8. In Part 7, "Orders Granting Development Consent", section 122, "Purpose for which compulsory acquisition may be authorised", provides that an order granting development

consent "may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met" (subsection (1)). The conditions in subsections (2) and (3) are that the land "(a) is required for the development to which the development consent relates", "(b) is required to facilitate or is incidental to that development", or "(c) is replacement land which is to be given in exchange for the order land …" (subsection (2)), and "… that there is a compelling case in the public interest for the land to be acquired compulsorily" (subsection (3)). Under section 123(1) and (2) an order granting development consent may include provision authorizing compulsory acquisition of land if the Secretary of State is satisfied that the application for the order included a request for compulsory acquisition of that land.

The application for a development consent order

9. Whitemoss Landfill is in the Green Belt, beside the M58 motorway on the southern side of Skelmersdale. A planning permission granted in October 2011 approved the disposal of hazardous waste on the site until 31 December 2018. The environmental permit restricts the disposal of hazardous waste to 149,500 tonnes per annum. But the annual throughput of waste has always been much less than that – at its highest 76,000 tonnes in 2013, and as low as 22,654 tonnes in 2011.

10. In June 2013 the inspector who conducted the examination into the Lancashire Site Allocation and Development Management Policies Local Plan – for the administrative areas of Lancashire County Council, Blackburn with Darwen Council and Blackpool Council – concluded that "there will be a continuing need to find a location for the disposal of perhaps up to 17,000 tonnes per annum throughout the plan period" (paragraph 155 of his report). The three authorities had concluded that there was "no need to specifically identify a new site or an extension to an existing site in this [local plan]", and that the originally proposed allocation for a hazardous waste landfill at Whitemoss Landfill should be deleted (paragraph 156). Instead, they now proposed "to include a criteria-based policy which would support permission for a new site, or an extension to an existing site, where there is a demonstrable need" (paragraph 157).

11. The application for the development consent order was submitted by Whitemoss Landfill Ltd. on 20 December 2013. The application site extends to about 25 hectares, comprising the existing landfill site of about 8.5 hectares and additional land, some 16 hectares, for its extension to the west and north-west. The application was accepted for examination on 17 January 2014.

The NPS

12. Part 1 of the NPS is its "Introduction". In section 1.1, "Background", paragraph 1.1.4 says the NPS "will be kept under review by the Secretary of State, in accordance with the requirements of [the 2008 Act], in order to ensure it remains appropriate for decision making", and that "[it] is expected that the Secretary of State would review the NPS approximately every five years

…". In section 1.2, "Infrastructure covered by this NPS", paragraph 1.2.1 confirms that the scope of the NPS includes the construction of facilities in England where the main purpose of the facility is expected to be the final disposal or recovery of hazardous waste and the capacity is expected to be "in the case of the disposal of hazardous waste by landfill …, more than 100,000 tonnes per year". In section 1.4, "The Appraisal of Sustainability", paragraph 1.4.1 says the NPS "has been subject to Appraisal of Sustainability … , incorporating the requirements for Strategic Environmental Assessment …". Paragraph 1.4.5 acknowledges, however, that "[it] will be for project applicants to set out in detail how they will meet the policy and requirements set out in the NPS".

13. Part 2 sets out "Government Policy on Hazardous Waste". Section 2.1, "Summary of Government Policy", identifies the four "main objectives of Government policy on hazardous waste", one of which is "(c) Self-sufficiency and proximity – to ensure that sufficient disposal facilities are provided in the country as a whole to match expected arisings of all hazardous wastes, … and to enable hazardous waste to be disposed of in one of the nearest appropriate installations". It goes on to refer to "A Strategy for Hazardous Waste Management in England", published by the Department for Environment Food and Rural Affairs in March 2010, which was "based on six high level principles intended to drive the management of hazardous waste up the waste hierarchy". One of these principles, it says, is "that the Government looks to the market to provide the infrastructure needed to implement the Strategy as it is industry that has the expertise required to consider where facilities are needed and the appropriate technologies to use". It adds that "Government believes its role is to provide a clear steer on the types of new facility that are needed and provide the framework (including legislative safeguards on human health and the environment) within which the infrastructure is to be provided".

14. Under the heading "Implementation of the waste hierarchy", paragraph 2.3.2 refers to the "waste hierarchy" in the Waste Framework Directive, and the "five steps which must be applied in waste prevention and management legislation and policy". The fifth step is "Disposal (of which landfill is considered to be at the bottom)". Paragraph 2.3.3 emphasizes that "[of] the disposal options available, landfilling of hazardous waste should only be used as a last resort". In section 2.4, "Government strategy for hazardous waste management", paragraph 2.4.1 refers to the five principles in the March 2010 strategy which are "of particular relevance to the need for new infrastructure". The second of these five principles, it says, "requires a reduction in reliance on landfill, with landfill only being used where, overall, there is no better recovery or disposal option". Paragraph 2.4.2 emphasizes that, under Principle 2 in the 2010 strategy, "Government looks to the market to provide the infrastructure to implement the Strategy", and "Government's role is to provide the right framework and encouragement to the private sector to bring the necessary infrastructure forward". Under the heading "Identification of suitable or unsuitable locations for infrastructure", paragraph 2.5.6 confirms that it is "not … Government policy to prescribe exactly where new hazardous waste infrastructure should be provided".

15. Part 3 of the NPS deals with the "Need for Large Scale Hazardous Waste Infrastructure". The policy of particular relevance in this case is in section 3.1, which states:

> "3.1 Summary of Need

Hazardous waste management infrastructure is essential for public health and a clean environment. There will be a demand for new and improved large scale hazardous waste infrastructure, because of the following main drivers:

Trends in hazardous waste arisings:

- Measures have been implemented to prevent and minimize the production of hazardous waste. Nevertheless, arisings have remained significant despite the economic downturn. This is because the introduction of measures to further improve the environmentally sound management of waste has increased the types of waste that must be removed from the municipal waste stream and be managed separately as hazardous waste.
- Changes to the list of hazardous properties in the revised Waste Framework Directive and forthcoming changes to the European Waste List, are expected to lead to further increases in the amount of waste that must be managed as "hazardous".
- There is a need to substantially reduce the relatively large amounts of hazardous waste continuing to be sent to landfill and increase that sent for recycling and reuse.

The need to meet legislative requirements:

- To apply the waste hierarchy – as set out in the revised Waste Framework Directive. New improved facilities will be required to optimise the extent to which the management of hazardous waste can be moved up the waste hierarchy.
- To treat hazardous waste that can no longer be sent to landfill following the phase out of the practice of relying on higher Landfill Directive Waste acceptance criteria.
- To comply with the "proximity principle" of adequate provision of hazardous waste facilities within each EU Member State.

'*A Strategy of Hazardous Waste Management in England (2010)*' established the need for new hazardous waste facilities and set out the types of facility required. Of the facilities identified, the Strategy determined that the following generic types would be likely to include nationally significant infrastructure facilities:

- Waste electrical and electronic equipment plants
- Oil regeneration plant
- Treatment plant for air pollution control residues
- Facilities to treat oily wastes and oily sludges
- Bioremediation / soil washing to treat contaminated soil diverted from landfill
- Hazardous waste landfill

The UK Ship Recycling Strategy encourages the development of Ship Recycling Facilities, some of which will need to be nationally significant infrastructure.

> The Secretary of State will assess applications for infrastructure covered by this NPS on the basis that need has been demonstrated."

16. In a passage headed "The total amounts of hazardous waste remain significant and are expected to increase", paragraph 3.2.2 says that "[despite] measures to prevent and minimise hazardous waste and the economic downturn, arisings have not declined particularly significantly with around 3.3m tonnes of hazardous waste being consigned in England in 2010", and "[arisings] are expected to increase as the economy improves". In section 3.4, "What types of NSIP [nationally significant infrastructure project] will be needed?", paragraph 3.4.1 says "[the] need for new facilities to manage hazardous waste was established" in the March 2010 strategy, which identified seven "generic categories of nationally significant infrastructure projects … likely to be needed", one of which was "[hazardous] waste landfill". Paragraph 3.4.13 confirms that "[landfill] is at the bottom of the waste hierarchy", but goes on to acknowledge that "there will remain some waste streams for which landfill is the best overall environmental outcome" and that "there may be future applications for development consent for nationally significant hazardous waste landfill". Paragraph 3.4.14 states:

> "Government has therefore concluded that there is a need for these hazardous waste infrastructure facilities. The Examining Authority should examine applications for infrastructure covered by this NPS on the basis that need has been demonstrated."

17. In Part 4, "Assessment Principles", paragraph 4.1.2 states:

> "4.1.2 Subject to any more detailed policies set out in the Hazardous Waste NPSs and the legal constraints set out in [the 2008 Act], there should be a presumption in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in this NPS."

Paragraph 4.1.3 says this:

> "4.1.3 In considering any proposed development, and in particular when weighing its adverse impacts against its benefits, the Examining Authority and the Secretary of State (as decision maker) should take into account:
>
> - its potential benefits including its contribution to meeting the need for hazardous waste infrastructure, job creation and any long-term or wider benefits; and
> - its potential adverse impacts, including any longer-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts."

Paragraph 4.4.3 says that "[whilst] this NPS and supporting [Appraisal of Sustainability] have shown that there is no alternative, at a strategic level, to meeting the need for new hazardous waste infrastructure, it must not be assumed that there will be no alternatives for individual projects".

18. Part 5, "Generic Impacts", acknowledges in paragraph 5.1.1 that "[some] impacts will be relevant to any hazardous waste infrastructure, whatever the type". It indicates the approach to decision-making in cases where such impacts are relevant – specifically, for example, in section 5.2, "Air Quality and Emissions"; in section 5.3, "Biodiversity and Geological Conservation"; in section 5.7, "Flood Risk"; in section 5.8, "The Historic Environment"; in section 5.9, "Landscape and Visual Impacts"; and in section 5.10, "Land Use Including Open Space, Green Infrastructure and Green Belt". The policy for decision-making on proposals for hazardous waste infrastructure in the Green Belt is set out, in familiar terms, in paragraph 5.10.15:

> "5.10.15 When located in the Green Belt hazardous waste infrastructure projects may comprise inappropriate development. Inappropriate development [Here a footnote refers to the policies in paragraphs 79 to 92 of the National Planning Policy Framework ("the NPPF")] is by definition harmful to the Green Belt and there is a presumption against it except in very special circumstances. The Secretary of State will need to assess whether there are very special circumstances to justify inappropriate development. Very special circumstances will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt, when considering any application for such development."

What does the policy in section 3.1 of the NPS mean?

19. The court's general approach to the interpretation of planning policy is well established and clear (see the decision of the Supreme Court in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, in particular the judgment of Lord Reed at paragraphs 17 to 19). The same approach applies both to development plan policy and statements of government policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd. and Richborough Estates Partnership LLP v Cheshire East Borough Council* [2017] UKSC 37, at paragraphs 22 to 26). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see paragraph 18 of Lord Reed's judgment in *Tesco Stores v Dundee City Council*). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see paragraph 18 of Lord Reed's judgment in *Tesco v Dundee City Council*). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paragraphs 24 to 26 of Lord Carnwath's judgment in *Suffolk Coastal District Council*). It is not suggested that those basic principles are inapplicable to the NPS – notwithstanding the particular statutory framework within which it was prepared and is to be used in decision-making.

20. It is common ground that the policy section 3.1 of the NPS is policy of a general kind, in the sense that it is not specific to any particular site or location or for a particular type of

development. This is not the kind of policy contemplated in section 5(5)(d) of the 2008 Act. Nor does it set out any criteria to be applied in deciding whether a particular location or locations are suitable, or might be suitable, for development of the type to which it relates. It is not, therefore, the kind of policy contemplated in section 5(5)(b).

21. Mr David Wolfe Q.C., for Mr Scarisbrick, submitted that the policy in section 3.1 merely requires it to be assumed that there is a "strategic" need, or a need in principle, for some large hazardous waste landfill facilities in England. So it is not appropriate for an Examining Authority, or the Secretary of State, when dealing with an application for a development consent order, to discuss the broad principle of having hazardous waste landfill as part of the mix of facilities. The policy means no more than that there is, in principle, a need for developments of this kind, and that the decision-maker should not debate whether hazardous waste landfill proposals should be rejected outright. But – as Mr Wolfe put it in his skeleton argument (at paragraph 35) – the policy "should not be understood as prescribing a need for any (i.e. each and every) proposed hazardous waste facility however large (the sky seems to be the limit) at any location in England …". It cannot mean, he submitted, that in making a decision on an application for a development consent order the Secretary of State must, or may, act on the unquestionable assumption that there is a need for the facility the developer has proposed – of whatever scale and capacity, in whichever location, and no matter whether the site is in the Green Belt or powers are being sought for the compulsory acquisition of third party land.

22. For the Secretary of State, Ms Nathalie Lieven Q.C. submitted that the policy in section 3.1 of the NPS makes it clear that the starting point in the making of a decision on a relevant project is that need is established, and that the applicant for a development consent order does not have to prove need for the type of development proposed. If the site on which the development is proposed is subject to constraints of the kind referred to in Part 5 of the NPS ("Generic Impacts"), such as being in the Green Belt or in an area at risk of flooding, the Secretary of State will have to carry out the appropriate planning balance. The approach indicated in the NPS, is in this sense perfectly conventional. The NPS establishes a national need for hazardous waste infrastructure of the relevant types, confirms that it is in the public interest that such need is met by the provision of new facilities and that there is a presumption in favour of consent being granted for such facilities, but recognizes that, inevitably, in the determination of particular applications, the meeting of the need, in the public interest, must be set against other material planning considerations. This will necessarily involve considering the weight to be attached to the need for the development. The NPS accepts that the market is likely to assess the level of need, and the most appropriate locations for development. But it also accepts, for example, that if the site is in the Green Belt, the Secretary of State will have to consider whether there are "very special circumstances" to justify the project in hand, and this will require him to evaluate the need for it, including any regional or local need that may be demonstrated.

23. On behalf of Whitemoss Landfill Ltd., Mr James Pereira Q.C. made submissions similar to Ms Lieven's. He argued that the NPS clearly does identify a need for hazardous waste infrastructure of the specified types. It is wrong, he submitted, to use such concepts as "strategic need" and "need in principle", in contradistinction to concepts such as "specific

need" and the "need for a particular project", to qualify the policy in section 3.1. The policy identifies a need for hazardous waste landfill infrastructure with a capacity sufficient to make it a nationally significant infrastructure project. As paragraph 3.4.14 makes plain, the need relates to a "application for infrastructure …", and must be taken into account in decision-making on particular projects. Because the NPS does not identify particular locations for the infrastructure it deals with, the need identified in the policy applies to relevant infrastructure wherever it is proposed. This does not mean, however, that the identified need will automatically determine the outcome of an application for a development consent order. The location of the proposed development, and its design, must be appropriate in environmental terms when judged against relevant policy. And any need for powers of compulsory acquisition must be justified with a compelling case, to which the policy need may be relevant but, again, not necessarily decisive.

24. In my view, the policy in the final sentence of section 3.1 of the NPS, read in its proper context, identifies and establishes the need for nationally significant infrastructure facilities of the "generic types" to which section 3.1 refers, which include facilities for "Hazardous waste landfill". It applies to all nationally significant infrastructure projects falling within those "generic types", not just to some. The need it identifies is a general need. It establishes what might be described as a "qualitative" need for hazardous waste infrastructure of the relevant types. It does not define a "quantitative" need for such development, by setting for each relevant type of infrastructure an upper limit to the number or capacity of the facilities required. It does not descend at all into the question of capacity, in the sense of the requirement for a given level of throughput of hazardous waste in infrastructure of the relevant types. It creates, at the level of national policy, a general assumption of need for such facilities. The need is not explicitly for an individual project of any particular scale or capacity or in any particular location. But the policy does not exclude any project of a relevant type. It applies to every relevant project capable of meeting the identified need, regardless of the scale, capacity and location of the development proposed. An applicant for a development consent order is entitled to proceed on that basis.

25. In framing the policy in section 3.1, the Government chose not to identify particular locations suitable or unsuitable for such development, and not to set down criteria as to suitable or potentially suitable locations. It leaves with "the market" the initiative in bringing forward development (section 2.1 and paragraph 2.4.2 of the NPS). And it is not limited in time, save to the extent that it must be read together with the statutory requirement, in section 6 of the 2008 Act, that a national policy statement be kept under review, and the indication in paragraph 1.1.4 that the NPS is expected to be reviewed "approximately every five years".

26. The comprehensive nature of the need is confirmed in paragraph 3.4.1 of the NPS, which refers to the 2010 strategy as having identified certain "generic categories" of nationally significant infrastructure projects that were "likely to be needed", and in paragraph 3.4.14, which records the Government's conclusion that "there is a need for these hazardous waste infrastructure facilities". Paragraph 3.4.13 does not deny the need for "hazardous waste landfill", but it does provide the specific context for the application of the policy in section 3.1 in cases where the Secretary of State has before him a proposal for a facility of this particular kind.

27. It is also clear that the policy in section 3.1 was deliberately included in the NPS not merely to identify the relevant national need, but also to guide the assessment of applications for development consent orders. Its explicit purpose is to ensure that when "applications for infrastructure covered by this NPS" come to be determined, the Secretary of State "will assess" such proposals on the basis that need has been demonstrated. To implement the policy selectively in relevant decision-making – by applying it to some of the projects embraced within it but not to others – would be to ignore its plain meaning and purpose as a policy intended to influence decisions on all proposals properly within its scope. The policy enables an Examining Authority, and the Secretary of State, to start with the assumption that a national need for such projects is established.

28. The policy in section 3.1 must be read together with the related passages in Part 4, "Assessment Principles" and Part 5, "Generic Impact". These include the "presumption" stated in paragraph 4.1.2 – the presumption in favour of granting consent to applications "for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in this NPS". This "presumption" is applicable to all such projects within the "generic types" referred to in the policy in section 3.1, including "Hazardous waste landfill". It is, however, only a "presumption". It is not automatically conclusive of the outcome of a particular application for a development consent order. This is confirmed by the policy in paragraph 4.1.3, which envisages a balancing exercise for a particular proposal, "weighing its adverse impacts against its benefits", one potential benefit being the proposal's "contribution to meeting the need for hazardous waste infrastructure, …".

29. Likewise, the policies for the treatment of "Generic Impacts" in Part 5, including the policy for the consideration of proposals for development in the Green Belt in section 5.10, require a project-specific and site-specific evaluation of the factors for and against a particular proposal in a particular location, applying the relevant policy principles. It follows for example, as Ms Lieven submitted, that the policy for development in the Green Belt, in paragraph 5.10.15, must be applied in the way described. Whether the "harm by reason of inappropriateness, and any other harm" is outweighed by the "need" for relevant hazardous waste infrastructure identified in section 3.1 and the "presumption" in favour of relevant proposals in paragraph 4.1.2, together with any other considerations weighing in favour of the project, so that "very special circumstances" exist, will be a matter for the Secretary of State to consider. In such a case the "need" identified in section 3.1 of the NPS may prove to be an important consideration in establishing "very special circumstances"; or it may not.

30. When determining an application for a development consent order, the Secretary of State must proceed as section 104 of the 2008 Act requires. The considerations bearing on his decision will include the policy need established in the NPS, any specific regional or local need for the development, any planning benefits, and the likely effects of the development on the environment. Where the development is proposed in the Green Belt, as in this case, the making of the decision must be approached as the relevant policy in the NPS requires.

31. Implicit in all this is that the weight to be given to particular considerations, including the need identified in the policy in section 3.1 of the NPS, will always be a matter for the exercise of the Secretary of State's planning judgment in the particular circumstances of the case. The need

identified and established in the policy must be given appropriate weight in the making of a decision on an application for a development consent order, but it will not necessarily carry decisive or even significant weight when the planning balance is struck. The weight to be given to that need, case by case, is not prescribed, either in the policy in section 3.1 or elsewhere in the NPS. It will not necessarily increase with the scale or capacity of a particular proposal. The policy does not place a "trump card" or a "blank cheque" in the hands of a developer. Nor does it provide the Secretary of State with "carte blanche" to grant consent, without carrying out a proper balancing exercise in which the need identified and established in the policy is given the weight it is due in the decision on the project in hand, no more and no less. The need identified in section 3.1 will always be a material factor in a case where the policy applies. It will only be met, and can only be met, by individual developments of the relevant types. In this sense it is truly a need for an individual project of a relevant type, and will count in favour of any such project when the decision is made. But the policy does not mean that the bigger the project, the greater is the need for it – or, as Mr Wolfe put it (in paragraph 35 of his skeleton argument), "the sky seems to be the limit". That is not what the policy says, and not how it should be understood.

The Examining Authority's report

32. The Examining Authority held a preliminary meeting on 21 May 2014. On 30 May 2014 they sent a letter to the parties, setting out their procedural decisions (in Annex A to their letter). On "the issue of need for a facility of the scale proposed", which had been raised by Lancashire County Council and CPRE Lancashire, they said they would be "inviting debate" during the examination as to "whether the need identified in the NPS (para 3.1) constitutes need at a strategic level, or whether it prescribes a need for any proposed hazardous waste facility, including a landfill facility of the scale and in the location of the Whitemoss proposal". In their observations on "Policy matters" in Annex A to their letter, they "[put] forward the view that the strategic need for hazardous waste infrastructure identified in the NPS should not be interpreted as an accepted need for a hazardous waste landfill facility at the application site", and that "[not] all applications for hazardous waste NSIPs will necessarily "clearly meet the need for infrastructure established in the NPS" (para 4.1.2) having regard to the policy objectives set out in the NPS in 2.1 and 2.3". They invited "[submissions] on the issue of whether or not there is a need for this particular facility in the location proposed …". However, they also said that they did "not consider that such submissions would relate to the merits of Government policy set out in the NPS, which is not a topic for debate during the examination".

33. The examination was conducted on the basis of written evidence and evidence given at hearings held between 17 July and 23 October 2014.

34. In paragraph 4.3 of their report of 21 February 2015, the Examining Authority identified the "issues of importance to interested parties". One of these was "(i) [whether] National Policy should be interpreted as stating that the need for nationally significant hazardous waste landfill sites has been demonstrated". ARROW, together with Lancashire County Council, West Lancashire Borough Council, CPRE Lancashire and others, had "questioned the need for the application scheme", pointing out that the existing landfill facility had an environmental permit

to deposit approximately 150,000 tonnes per annum of hazardous waste, but that since 2006, less than 100,000 tonnes per annum of waste had been taken for disposal (paragraph 4.13, in a section of the report headed "Conformity with NPSs and other key policy statements").

35. Having acknowledged that "[the] issue of need is addressed in the NPS and summarised in [section] 3.1" (paragraph 4.14), the Examining Authority went on to say (in paragraph 4.16):

> "4.16 It is stated in NPS [section] 3.1 that the [Secretary of State] *"will assess applications for infrastructure covered by this NPS on the basis that need has been demonstrated"*. Need is therefore to be taken as established for the application project regardless of the past history of the existing landfill site."

and (in paragraph 4.18):

> "4.18 In view of the importance of hazardous waste infrastructure to support economic activities and public services, and the requirement for England to be self-sufficient in disposal facilities, we give considerable weight to the need for the application project."

36. They also considered whether there was, specifically, a need for hazardous waste facilities in the North West region. They acknowledged that "the North West is itself a major generator of hazardous waste"; that "[the] existing provision for hazardous waste landfill in the region includes Minosus in Cheshire, the Ineos Chlor Randle Island Landfill in Runcorn, and the current Whitemoss Landfill site" (paragraph 4.26); but that there were "limitations as to the types of waste which can be deposited at Minosus, and evidence was submitted to the effect that the Ineos site had no remaining constructed void space available", and that "[in] these circumstances, there is a realistic prospect that the application project would provide for regionally-generated hazardous waste arisings" (paragraph 4.27).

37. Dealing with the relationship of the application project to policy for development in the Green Belt in the NPPF, the Examining Authority concluded that "… [during] its construction and its operational phase the project would … be inappropriate development in the [Green Belt]" (paragraph 4.52); that "by raising the ground level of a significant area [of generally open and relatively low-lying countryside south of the motorway] there would be an intrusion into the openness of the wider countryside which … would interfere with and have an impact on the openness of the [Green Belt]" (paragraph 4.56); but that, "… the overall impact on openness in the long term would be mitigated to some degree through the proposals for the restoration of the site" (paragraph 4.57).

38. When dealing with the policies of the development plan, they noted that the inspector in the MWLP [the Joint Lancashire Minerals and Waste Local Plan Site Allocation and Development Management Policies] process "considered there would be a continuing need for a location that would provide capacity for the landfilling of hazardous waste of up to 17,000 tpa generated from within the plan area only" (paragraph 4.68). They repeated their conclusion that "the need for the application project is established in the NPS" (paragraph 4.70), and reminded themselves that "the NPS takes priority over the development plan in the determination of this application", and that "[as] a result there is no requirement for [Whitemoss Landfill Ltd.] to

demonstrate a specific local or regional need for the proposal" (paragraph 4.76). They concluded that "the application project would clearly meet the need identified in the MWLP", and that although it "would provide well in excess of the capacity identified in the MWLP, … it is not the intention of the NPS to limit provision to that which would meet the locally-generated demand" (paragraph 4.77). The project "would contribute to self-sufficiency as required by the MWCS [the Joint Lancashire Minerals and Waste Local Development Framework Core Strategy], and fulfil the need identified in the MWLP". Though there "may be some areas of conflict with other development plan policies", these were "not so significant as to weigh heavily against the application project" (paragraph 4.78).

39. The Examining Authority also noted that there had been "a relatively recent review of potential hazardous waste sites through the Development Plan process, where no alternatives to Whitemoss Landfill were identified", and that "no alternative site was put forward as a result of the consultation process on the [environmental statement]" (in paragraph 4.85).

40. In their "Conclusions on the main issues and whether very special circumstances exist", the Examining Authority directed themselves that under section 104(3) of the 2008 Act "the application must be decided in accordance with the NPS, subject to certain exceptions", and concluded that it "[did] not fall within any of the exceptions" (paragraph 4.316). They said it was "[fundamental] to [their] consideration of the White Moss project" that "the location of the application site [is] within the Green Belt" (paragraph 4.317).

41. Under the heading "Considerations which weigh in favour of the application", they said (in paragraphs 4.331 to 4.337):

> "4.331 There is no target level of provision, or limit to the capacity or location of new facilities set within the NPS. It is left for operators to use their judgement as to the location and capacity of new facilities [4.23]. The importance of providing for all types of hazardous waste infrastructure, including landfill, is clear from the wide range of activities which rely on the availability of such infrastructure [4.17]. With growth in the economy, the level of arisings is expected to increase [4.15]. The availability of suitable facilities within England to meet the demands resulting from economic growth is essential to comply with the principles of self-sufficiency and proximity in the revised Waste Framework Directive [4.17].
>
> 4.332 Hazardous waste infrastructure of national significance is necessary to meet a national rather than a regional or local need [4.28]. Nevertheless, in this case the project would be located in the North West region which is a national hub for treating and processing hazardous waste, and with its industrial legacy and the regeneration of the Liverpool/Merseyside and Manchester conurbations, the region is itself a major generator of hazardous waste [4.26]. The application project would be well located to serve this market.
>
> 4.333 Existing provision for hazardous waste landfill in the North West is limited [4.27]; the examination into the … MWCS identified a need for some 17,000 tpa of hazardous

waste generated from within its plan area; and Policy LF3 provides support for new provision subject to certain criteria.

4.334 We have noted the arguments as to whether there is a need for a facility of the capacity proposed at White Moss. In view of the provisions of the NPS, we do not question the level of need. We do, however, recognise that there could be environmental consequences if the rate of deposits is not sufficient to fill the capacity of the voids, and address this through [requirement] 32 in the recommended [development consent order] [4.140].

4.335 We find that in addition to the national need for hazardous waste landfill identified in the NPS, the application project would be well located to meet a regional need for such a facility. Without the application project, the existing Whitemoss Landfill would have no capacity beyond 2015, and the need identified in the examination of the MWCS would not be met [4.68].

…

4.337 … No alternative site has been put forward for hazardous waste landfill and the relatively recent review of hazardous waste sites through the Development Plan process did not identify any alternatives [4.85].

… ."

42. In their "Balance and conclusions", having acknowledged again (in paragraph 4.341) that the "application project would constitute inappropriate development which in itself is harmful to the [Green Belt]", they said this:

> "4.341 … In summary, we find the harm to the [Green Belt] and any other harm to comprise:
>
> - During the 20 years of construction and operation, an adverse impact on openness and conflict with a purpose of the [Green Belt] to protect the countryside from encroachment.
> - Following restoration, there would be some impact on openness but the restoration proposals would restore the rural character of the site such that there would no longer be encroachment.
> - A limited degree of harm to the character and appearance of the countryside during the 20 years of construction and operation.
> - The perception of a risk to health within the local community to which we attribute limited weight."

As for the considerations on the other side of the balance, they said (in paragraph 4.342):

> "4.342 In relation to the "other considerations" which fall to be weighed against harm to the [Green Belt] and any other harm, in summary we find as follows:

- The presumption in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in the NPS. The application project would meet that need.
- As a project which accords with the policy and requirements of the NPS, it would constitute sustainable development which attracts the presumption in favour of sustainable development set out in the NPPF.
- The project would contribute towards meeting the principles of national self-sufficiency and of proximity in the revised Waste Framework Directive.
- The importance of the facility to meet the need for hazardous waste disposal within the North-West of England.
- The locational benefits of the landfill facility at White Moss, reflecting its proximity to the national motorway network, with consequently no significant adverse transport impacts and being easy to reach by businesses looking to manage waste.
- The ability to make use of current infrastructure, reducing the environmental footprint of creating new facilities.
- The limited life-span of the landfill operations and its consequent impacts.
- The long-term benefits to biodiversity from the restoration proposals, replace an ecologically poor site with a more habitat and species-rich environment.
- The other long-term benefits in terms of restoration of Grade 2 agricultural land, visual amenity and recreation."

Their "overall conclusion" (in paragraph 4.343) was that "these "other considerations" are of such importance that they clearly outweigh the harm to the [Green Belt] and the limited other harm that [they had] identified". And "[looking] at the case as a whole", they concluded that "very special circumstances exist which justify the making of the White Moss Landfill [development consent order]."

43. In section 6 of their report, which dealt with the request for powers of compulsory acquisition, the Examining Authority directed themselves on the requirements of sections 122 and 123 of the 2008 Act (paragraphs 6.1 to 6.15) and a number of "general considerations", including the need for the decision-maker to explore "[all] reasonable alternatives to compulsory acquisition", and to "be satisfied that the purposes stated for the acquisition are legitimate and sufficient to justify the inevitable interference with the human rights of those affected" (paragraph 6.15). They concluded (in paragraph 6.38):

> "6.38 In Section 4 we concluded that there are very special circumstances which clearly outweigh the harm to the [Green Belt] and any other harm from the application project. On the basis of this conclusion we find that there is a compelling case in the public interest for the development as a whole and there is a compelling case in the public interest for the acquisition of Plot 18B. Compulsory acquisition would therefore be compliant with [section] 122 of [the 2008 Act] as a whole."

44. They addressed "Human Rights Act 1998 considerations" (in paragraphs 6.52 to 6.56), concluding (in paragraph 6.52):

> "6.52 In the event that [compulsory acquisition] rights are granted, Article 1 of the First Protocol [to the Human Rights Convention] is engaged. Article 8 is also engaged in relation to Plots 4 and 8A … . … [Development] could not take place in the manner proposed without this land. The other land to be acquired is necessary for the development to proceed in the manner intended. No objections have been raised by affected persons other than in respect of the WLBC-owned land, Plot 18B. Those affected would be entitled to compensation and … there is, in principle, the ability for this to be available. Interference with private rights in order to carry out the development would be both proportionate and justified in the public interest."

45. In their conclusions on the request for compulsory acquisition powers, they said "the case for [compulsory acquisition] must be dependent on and consistent with the view that the [development consent order] as a whole should be made" (paragraph 6.58), and (in paragraph 6.59):

> "6.59 The [Examining Authority] has shown in the conclusions to Section 4 that it has reached the view that development consent should be granted. Having regard to all the particular circumstances in this case for compulsory acquisition, in the event that the Secretary of State decides to give consent and make the Order, there would be a compelling case in the public interest for acquisition. There is no disproportionate or unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998."

46. In their "Overall conclusion and recommendation on the DCO", the Examining Authority said "that the recommended DCO provides the appropriate balance between the need to facilitate the development with the requirements necessary to mitigate potentially adverse consequences" (paragraph 7.22). And they confirmed their conclusion "that the potential harm to the [Green Belt] together with the limited other harm is clearly outweighed by the need for national hazardous waste infrastructure set out in the NPS, combined with the other benefits of the project including its location, the use of existing infrastructure, and the benefits following restoration", and that "[as] a result the very special circumstances exist to justify making the White Moss DCO" (paragraph 8.11).

The Secretary of State's decision letter

47. The Secretary of State's conclusions in his decision letter mirror the Examining Authority's in their report. In considering "Conformity with National Policy Statements and other key policy statements", he said (in paragraph 12):

> "12. The Secretary of State agrees with the ExA that, in accordance with [section] 104(3) of the 2008 Act, the Application falls to be considered against the National Policy Statement for Hazardous Waste June 2013 (NPS) (ER 4.9), and that the NPS is the primary basis for decision-making on nationally significant infrastructure projects (NSIP) for hazardous waste (ER 4.12). He notes that, for the reasons set out in paragraph 3.1 of the NPS, need is to be taken as established for the Application regardless of the

past history of the existing landfill site (ER 4.16). In view of the importance of hazardous waste infrastructure to support economic activities and public services, and the requirement for England to be self-sufficient in disposal facilities, the Secretary of State, like the ExA, gives considerable weight to the need for the Application (ER 4.18)."

48. As for "Development Plan Policies", he said (in paragraph 15):

> "15. … Whilst he agrees with the ExA that there is no requirement for the Applicant to demonstrate a specific local or regional need for the proposal (ER 4.76), he notes that the development plan includes a number of policies against which it is appropriate to assess the project, and that many of the matters covered are also raised in the NPS (ER 4.76). Overall, he agrees with the ExA that the Development would contribute to self-sufficiency as required by the MWCS, and fulfill the need identified in the MWLP, and that while there may be some areas of conflict with other development plan policies, these are not so significant as to weigh heavily against the Development (ER 4.78)."

49. When considering the "Green Belt balance", the Secretary of State agreed (in paragraphs 58 to 62) with the relevant conclusions of the Examining Authority, including their assessment, in paragraphs 4.330 to 4.340 of their report, of the "other considerations" weighing in favour of the development, to be set against the harm to the Green Belt and any other harm (paragraph 61). He specifically agreed (also in paragraph 61) with the Examining Authority's summary in paragraph 4.342 of their report. Of the nine considerations to which he referred in the corresponding summary of his own, the first and fourth were these:

> "
> - the presumption in favour of granting consent to applications for hazardous waste NSIPs which clearly meet the need for such infrastructure is established in the NPS; and the Development would meet that need;
>
> …
> - the importance of the facility to meet the need for hazardous waste disposal within the North-West of England;
>
> …".

He agreed with the Examining Authority's conclusion in paragraph 4.343 of their report that, as he put it (in paragraph 62), "the other considerations are of such importance that they clearly outweigh the harm to the Green Belt and the limited other harm that has been identified …", and that "very special circumstances exist which justify the making of the Order".

50. The Secretary of State also agreed with the Examining Authority, in paragraph 6.59 of their report, that there was "a compelling case in the public interest for [compulsory acquisition]" and "no disproportionate or unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998". He concluded too that there was a "compelling case in the public interest for the creation and acquisition of … new rights", and that "granting this power would also not give rise to any disproportionate or unjustified interference with human

rights so as to conflict with the provisions of the Human Rights Act 1998" (paragraph 77 of the decision letter).

51. Drawing his conclusions together, he said that he considered "the harm to the Green Belt together with the limited other harm he [had] identified" was "clearly outweighed by the need for national hazardous waste infrastructure set out in the NPS, together with the other benefits of the project … ; and that as a result very special circumstances exist to justify making the [development consent order]" (paragraph 88); and that "the requests for compulsory acquisition powers meet the tests in [sections] 122 and 123 of the 2008 Act, with a compelling case in the public interest for the land to be acquired compulsorily" (paragraph 89).

52. The development consent order included, in Schedule 2, a number of conditions, one of which provided for the "Review of void consumption", as recommended in the Examining Authority's requirement 32, to which they had referred in paragraph 4.334 of their report.

Did the Secretary of State misinterpret or misapply policy in the NPS?

53. Mr Wolfe submitted that the Secretary of State misdirected himself in his understanding and application of the policy in section 3.1 of the NPS – as had the Examining Authority in their report. He thought – wrongly – that the policy required him to assume a need for a hazardous waste landfill facility on the application site with a capacity of 150,000 tonnes per annum. He thought – again, wrongly – that the policy compelled him to assume a need for a facility of whatever size a developer might choose to propose, and therefore that he must not evaluate competing evidence and submissions as to the extent of the real need, if any. He prevented himself from considering whether a facility of the particular size proposed was actually needed. This made it impossible for him to deal as he should with at least three basic issues: first, whether there truly was a need for this proposed development, and "very special circumstances" justifying its approval as "inappropriate development" in the Green Belt; secondly, whether there was a "compelling case in the public interest" for Whitemoss Landfill Ltd. to be given powers of compulsory acquisition over third party land; and thirdly, whether the development itself, and the compulsory acquisition of land, would be a proportionate interference with the landowners' human rights under the European Convention on Human Rights, including their right to property under Article 1 of the First Protocol – and, in particular, whether a less intrusive measure could have been used and whether a fair balance had been struck between Convention rights and the public interest (see the judgment of Lord Sumption in *Bank Mellat v Her Majesty's Treasury (No. 2)* [2014] A.C. 700, at paragraph 20). If a hazardous waste landfill facility was shown to be needed, but not of the size proposed, should development consent be granted, and powers of compulsory acquisition given, for a facility as large as this? The answer, Mr Wolfe submitted, must be "No". And if the need for a facility of a capacity of more than 100,000 tonnes per annum was not demonstrated, the Secretary of State would have had no power to make a development consent order for the scheme required.

54. I cannot accept that argument. On a fair reading of the Examining Authority's report and the Secretary of State's decision letter, I do not think it can be said that either betrays any

misunderstanding or a misapplication of the relevant policies in the NPS – including the policy in section 3.1.

55. These proceedings do not – and could not – attack the NPS itself as unlawful. Such a challenge could only have been brought under section 13 of the 2008 Act. There has been none. Nor can it be said that the Secretary of State's decision is invalidated by his reliance on a policy which exceeded his power to issue a national policy statement under section 5 of the 2008 Act. Such an argument would be misconceived. The issue for us is not whether the NPS is lawful, but whether, in this case, it was lawfully construed and applied.

56. Neither the Examining Authority nor the Secretary of State misled themselves as to what the policy in section 3.1 says. The Examining Authority quoted it, accurately, in paragraph 4.16 of their report – which the Secretary of State noted in paragraph 12 of his decision letter. They also referred to some of the salient passages in the text of the NPS, which explain the policy in section 3.1.

57. What did the Examining Authority mean when they said in paragraph 4.16 of their report that "[need] is … taken to be established for the application project …", and when they referred in paragraph 4.18 to "the need for the application project" – with the Secretary of State's agreement in paragraph 12 of his decision letter? In my view, they were doing what the policy in section 3.1 required of them. They were acknowledging that the application project, because it fell within the scope of the policy in section 3.1 of the NPS and would contribute to the meeting of that need, was one of those projects for which a national need was established by the policy. Like any other infrastructure project of a relevant type and of the requisite scale, this one engaged the policy in the final sentence of section 3.1. Under that policy, therefore, there was a need for "the application project". As the policy is explicitly intended to guide decision-making on applications for development consent, this proposed development, like any other relevant proposal, had therefore to be assessed "on the basis that need had been demonstrated". In this sense, and to this extent, need was established for it by national policy.

58. The Examining Authority did not read more into the policy than is actually there. They were not saying that the need established by the policy in section 3.1 of the NPS was a specific requirement for a facility of a particular capacity – whether 150,000 tonnes per annum or any other capacity above 100,000 tonnes per annum – or in a particular location – whether on this application site or any other. Rather, they were acknowledging, rightly, that this particular project was one to which the general policy in the final sentence of section 3.1 of the NPS applied, and for which, therefore, a national need was deemed by government policy to exist – and that the existence of this need for the project did not depend on the scale, capacity and location of the development proposed, or on the planning history of the existing landfill site. They clearly understood that. And so did the Secretary of State.

59. The Examining Authority's other conclusions referring to NPS policy as it relates to the need for the project are all consistent with the correct interpretation of that policy. In paragraph 4.77 of their report they recognized, rightly, that national policy in the NPS does not intend to limit the provision of new hazardous waste facilities to the meeting of "locally-generated demand"; in paragraph 4.331, that the NPS does not set any "target level of provision, or limit to the

capacity or location of new facilities", leaving it to "operators to use their judgement as to the location and capacity of new facilities"; in paragraph 4.332, that hazardous waste infrastructure "of national significance" is necessary to meet "a national rather than a regional or local need"; in paragraph 4.334, that, in view of the provisions of the NPS, "the level of need" was not to be questioned; in paragraph 4.342, that there is a "presumption in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in the NPS", and that the "application project would meet that need". All of this shows a sound understanding of NPS policy, including the policy in section 3.1. The same may be said of the Secretary of State's relevant conclusions, in paragraph 61 of his decision letter.

60. In view of the requirement in section 104(2) of the 2008 Act that the Secretary of State "must have regard to" any relevant national policy statement, and the requirement in section 104(3) that he must decide the application "in accordance with" any such national policy statement unless one of the relevant exceptions apply, he would have been at fault if he had not taken into account the national need established in section 3.1 of the NPS, and the presumption in paragraph 4.1.2.

61. In this case the Secretary of State found himself able to make his decision in accordance with the NPS, and did.

62. In paragraph 4.18 the Examining Authority said they gave "considerable weight" to the need for the application project – by which, as is clear from the context, they meant the national need for such projects established in the NPS. In paragraph 12 of his decision letter the Secretary of State agreed. He was entitled to give that need the weight he did. This was a matter of planning judgment for him, subject only to challenge on public law grounds (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780). To assess the weight to be given to the need for the project under the policy in section 3.1 of the NPS as "considerable" was not irrational. To give "considerable" weight to a need established in a statement of national planning policy is not, on the face of it, a surprising planning judgment, let alone an unreasonable one. Indeed, it was consistent with the policy "presumption" in paragraph 4.1.2 of the NPS, the "presumption in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure in this NPS".

63. Neither the Examining Authority nor the Secretary of State concluded that the need for the project under NPS policy was itself greater, or the weight to be given to it increased, by the fact that the proposed facility would have a capacity of 150,000 tonnes per annum, rather than, say, 100,001 tonnes per annum, or some other level of capacity in between. The Secretary of State simply gave the need "considerable weight". But he did not leap from that to the conclusion that the development must be approved. Important as it was, he did not treat the policy need for the development as the single decisive factor in his assessment of the planning merits.

64. Mr Wolfe criticized the Examining Authority's observation in paragraph 4.334 of their report that "[in] view of the provisions of the NPS", they did "not question the level of need". I do not think that criticism is justified. Contrary to Mr Wolfe's submission, the Examining Authority were not, without scrutiny or question, equating "the level of need" under NPS policy with the

capacity of the facility proposed in Whitemoss Landfill Ltd.'s application. They were simply acknowledging, correctly, that the policy in section 3.1 of the NPS does not set any maximum or minimum "level of need" for the facilities to which it relates, or make the need for any particular proposal depend on its scale or capacity. And in paragraph 61 of his decision letter the Secretary of State agreed. The Examining Authority were alive to the possibility that the "rate of deposits" might not turn out to be "sufficient to fill the capacity of the voids", and dealt with this possibility by providing for the "Review of void consumption" in requirement 32, which was incorporated in Schedule 2 to the development consent order.

65. There were, it should be remembered, two further needs to be considered in this case, both of which played an important part in the Examining Authority's assessment of the project. As well as the national need for the project arising from the NPS, they found both a regional need – a need for additional hazardous waste infrastructure in the North-West region, and also a local need – for additional capacity in the MWLP area.

66. The regional need arose from the "limitations as to the types of waste that can be deposited at [the] Minosus [landfill site]" and the lack of further "void space" at the Ineos site (paragraph 4.27 of the report). The existing provision for hazardous waste landfill in the region was "limited" (paragraph 4.333). The Examining Authority concluded that this development could meet that regional need (paragraphs 4.26 and 4.27), and that it "would be well located" to do so (paragraphs 4.332 and 4.335). They attached "importance" to this consideration (paragraph 4.342). And the Secretary of State agreed (in paragraph 12 of his decision letter).

67. The local need was identified in the MWLP. At that tier of planning for the provision of hazardous waste infrastructure, as the Examining Authority acknowledged, the application site had itself been "identified in an early iteration of the MWLP as suitable for hazardous waste landfill". The "need identified in the MWLP for additional capacity [had] not been fulfilled in the development of any other site". This project "would clearly meet the need identified in the MWLP" (paragraph 4.77). It would "contribute to self-sufficiency as required by the MWCS", and would "fulfil the need identified in the MWLP" (paragraph 4.78). The Secretary of State agreed (in paragraph 15 of his decision letter). Without it, "the need identified in the examination of the MWCS would not be met" (paragraph 4.335). The fact that the proposed development would provide "well in excess of the capacity identified in the MWLP" did not negate those conclusions on the ability of the development to meet a local need, because – as the Examining Authority said – it was "not the intention of the NPS to limit provision to that which would meet the locally-generated demand" (paragraph 4.77).

68. This was not a case in which the Secretary of State had to determine, at the same time, two or more applications for development in a particular area, each promoted as nationally significant infrastructure projects under the 2008 Act, each capable of meeting an identified regional or local need for new hazardous waste facilities of a particular type within the scope of the policy in section 3.1 of the NPS. When that happens, the Secretary of State may find it necessary to assess the comparative merits of the proposals as competing or alternative schemes, or to consider their potential cumulative effects, and perhaps to grant development consent only for one. He may find, in the circumstances, that the weight to be given to the national need under

NPS policy is not enough to outbalance the planning objections to one or more of the proposals before him.

69. The task facing the Secretary of State here was more straightforward. Only one application had to be determined. There was no rival scheme to compare with Whitemoss Landfill Ltd.'s project. To discharge the requirements of section 104 of the 2008 Act, the Secretary of State had to undertake an appropriate balance of considerations weighing for and against this particular proposal, giving NPS policy the statutory priority it was due. He also had to be satisfied, under the provisions of sections 122 and 123, that there was a compelling case in the public interest for the compulsory acquisition of land, and that both the development itself and that compulsory acquisition of land would be a proportionate interference with the landowners' human rights.

70. In my view, in all these respects the Secretary of State determined the application lawfully, complying with the requirements of the statutory scheme. Whether the outcome would have been different if the proposal for the site had been a hazardous waste landfill facility of greater capacity than 150,000 tonnes per annum, or less, is immaterial.

71. I do not accept that the Secretary of State went wrong in his approach to the justification for the project as inappropriate development in the Green Belt. He did exactly what paragraph 5.10.15 of the NPS says he should. In paragraph 4.341 of their report the Examining Authority referred to the four main considerations constituting "harm to the [Green Belt] and any other harm". In paragraph 4.342 they referred to the considerations, nine in all, which in their view had to be weighed against the harm. Two of those nine considerations related to the need for the project: the fact that it enjoyed "the presumption [in the NPS] in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in the NPS", and "[the] importance of the facility to meet the need for hazardous waste disposal within the North-West of England". The other seven were particular attributes and benefits of the proposal: its compliance with the "the policy and requirements of the NPS" and the finding that it was "sustainable development"; its contribution to "meeting the principles of national self-sufficiency and … proximity in the … Waste Framework Directive"; its "locational benefits … reflecting its proximity to the national motorway network …"; its "ability to make use of current infrastructure …"; the "limited life-span of the landfill operations and its consequent impacts"; the "long-term benefits to biodiversity from the restoration proposals …"; and "[the] other long-term benefits in terms of restoration of Grade 2 agricultural land, visual amenity and recreation". The Examining Authority were able to conclude, in paragraph 4.343, that these "other considerations", taken together, "clearly [outweighed] the harm to the [Green Belt] and the limited other harm", and that "very special circumstances" existed to justify the making of the development consent order. They repeated that conclusion at the end of their report, in paragraph 8.11. And the Secretary of State agreed with it (in paragraph 62 of his decision letter).

72. It is plain therefore that neither the Examining Authority nor the Secretary of State regarded the national need under the policy in section 3.1 of the NPS as an automatically overriding factor in the planning balance that had to be struck for this particular project. They did not treat it as decisive, on its own, of the Green Belt issues, or of any other issue. It did not displace any other

relevant factor, on either side of the balance. It was only one of several considerations, which, in combination, were found to be sufficiently strong to enable consent for the project to be granted. The ability of the development to address the regional need was a separate and additional factor. So were each of the attributes and benefits to which the Examining Authority referred to in paragraph 4.342 of their report. The weight given to those considerations, both individually and together, was ultimately for the Secretary of State's planning judgment, which in my view he exercised lawfully. The "considerable" weight he gave to the national need for the project under NPS policy was, as I have said, within the range of reasonable planning judgment. It does not indicate any misinterpretation or misapplication of NPS policy.

73. Similar conclusions apply to the Secretary of State's consideration of the evidence and arguments on the need for the development consent order to include provision authorizing the compulsory acquisition of land under sections 122 and 123 of the 2008 Act, and on the question of whether the development itself, and the compulsory acquisition of land, would be a proportionate interference with the landowners' human rights. Again, I do not accept that either the Examining Authority or the Secretary of State fell into error.

74. As one would expect, the Examining Authority based their conclusions on the need for powers of compulsory acquisition squarely upon their assessment of and conclusions on the planning merits of the proposed development. Having concluded that the case for approving the project was secure – on the basis that the "other considerations" they had identified were "of such importance that they clearly outweigh the harm to the [Green Belt] and the limited other harm", so that there were "very special circumstances … which justify the making of the [development consent order]" (paragraph 4.343 of their report) – they went on to consider the evidence and representations for and against the granting of the powers of compulsory acquisition required to enable the project to go ahead. As they said, the case for compulsory acquisition depended on the view that the development consent order "as a whole" should be made (paragraph 6.58). Their conclusion that if the development consent order were made there would be a "compelling case in the public interest for acquisition" was founded on the conclusion in section 4 of their report that development consent should be granted (paragraph 6.59) – and the Secretary of State agreed (in paragraph 77 of his decision letter). Underpinning that conclusion were the nine "other considerations" set out in paragraph 4.342 of the report.

75. Two things follow. First, if, as I have concluded, the Examining Authority and the Secretary of State neither misinterpreted nor misapplied NPS policy in their assessment of the planning merits, they made no such error in concluding that powers of compulsory acquisition ought to be included in the development consent order under sections 122 and 123. And second, the national need for the project under the policy in section 3.1 of the NPS did not play any greater role than it lawfully could in the assessment of the factors weighing in favour of compulsory acquisition powers being granted. It was, again, only one of several considerations in that assessment.

76. The same goes for the Examining Authority's and the Secretary of State's consideration of the landowners' human rights, under article 1 of the First Protocol and article 8. The conclusion again was clear, and based on a proper consideration of the planning merits and of the need for powers of compulsory acquisition to be included in the development consent order. Both the

Examining Authority and the Secretary of State were satisfied that "[interference] with private rights in order to carry out the development would be both proportionate and justified in the public interest" (paragraph 6.52 of the Examining Authority's report and paragraph 77 of the Secretary of State's decision letter). And in the light of their view that development consent for the project should be granted, and that, if it were granted, "there would be a compelling case in the public interest for acquisition", they were also satisfied that there was "no disproportionate or unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998" (paragraph 6.59 of the report and paragraph 77 of the decision letter). I do not think that conclusion can be faulted. It discloses no misinterpretation or misapplication of national policy in the NPS. It is both lawful and sound.

77. In my view, therefore, the Secretary of State neither misinterpreted nor misapplied any policy of the NPS in making the development consent order – nor did he otherwise err in law.

Conclusion

78. For those reasons I would dismiss the claim for judicial review.

Lord Justice Irwin

79. I agree.

The Senior President of Tribunals

80. I also agree.

Neutral Citation Number: [2021] EWHC 2161 (Admin)

Case No: C0/4844/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before :

THE HON. MR JUSTICE HOLGATE

Between :

The Queen on the application of SAVE STONEHENGE WORLD HERITAGE SITE LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and –	
(1) HIGHWAYS ENGLAND **(2) HISTORIC BUILDINGS AND MONUMENTS COMMISSION FOR ENGLAND ("HISTORIC ENGLAND")**	**Interested Parties**

- -
- -

David Wolfe QC and Victoria Hutton (instructed by **Leigh Day**) for the **Claimant**
James Strachan QC and Rose Grogan (instructed by the **Government Legal Department**) for the **Defendant**
Reuben Taylor QC (instructed by **Pinsent Masons**) for the **First Interested Party**
Richard Harwood QC and Christiaan Zwart (instructed by **Shoosmiths**) for the **Second Interested Party**

Hearing dates: 23rd, 24th and 25th June 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment will be handed down remotely by circulation to the parties or their representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down will be deemed to be 3:45pm on 30 July 2021.

Mr Justice Holgate:

Introduction

1. The claimant, Save Stonehenge World Heritage Site Limited, seeks to challenge by judicial review the decision dated 12 November 2020 of the defendant, the Secretary of State for Transport ("SST"), to grant a development consent order ("DCO") under s.114 of the Planning Act 2008 ("the PA 2008") for the construction of a new route 13 km long for the A303 between Amesbury and Berwick Down which would replace the existing surface route. The new road would have a dual instead of a single carriageway and would run in a tunnel 3.3 km long through the Stonehenge part of the Stonehenge, Avebury and Associated Sites World Heritage Site ("WHS").

2. The application for the order was made by the first interested party, Highways England ("IP1"), a strategic highways company established under the Infrastructure Act 2015 ("IA 2015").

3. The second interested party, Historic England ("IP2"), was a statutory consultee in relation to the application and is the government's statutory advisor on the historic environment. IP2 has long been involved in the management of Stonehenge and since 2014 with the current road proposals.

4. The claimant is a company formed by the supporters of the Stonehenge Alliance, which is an unincorporated, umbrella campaign group, which co-ordinated the objections of many of its supporters before the statutory examination into the application.

5. On 16 November 1972 the General Conference of UNESCO adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage ("the World Heritage Convention" or "the Convention"). The UK ratified the Convention on 29 May 1984. In 1986 the World Heritage Committee ("WHC") inscribed Stonehenge and Avebury as a WHS having "Outstanding Universal Value" ("OUV") under article 11(2).

6. In June 2013 the WHC adopted a statement of the OUV for the WHS which included the following:-

> "The World Heritage property comprises two areas of chalkland in Southern Britain within which complexes of Neolithic and Bronze Age ceremonial and funerary monuments and associated sites were built. Each area contains a focal stone circle and henge and many other major monuments. At Stonehenge these include the Avenue, the Cursuses, Durrington Walls, Woodhenge, and the densest concentration of burial mounds in Britain. At Avebury, they include Windmill Hill, the West Kennet Long Barrow, the Sanctuary, Silbury Hill, the West Kennet and Beckhampton Avenues, the West Kennet Palisade Enclosures, and important barrows."

The WHS is said to be of OUV for qualities which include the following:-

> "● Stonehenge is one of the most impressive prehistoric megalithic monuments in the world on account of the sheer size of its megaliths, the sophistication of its concentric plan and architectural design, the shaping of the stones, uniquely using both Wiltshire Sarsen sandstone and Pembroke Bluestone, and the precision with which it was built.
>
> ● There is an exceptional survival of prehistoric monuments and sites within the World Heritage property including settlements, burial grounds, and large constructions of earth and stone. Today, together with their settings, they form landscapes without parallel. These complexes would have been of major significance to those who created them, as is apparent by the huge investment of time and effort they represent. They provide an insight into the mortuary and ceremonial practices of the period, and are evidence of prehistoric technology, architecture, and astronomy. The careful siting of monuments in relation to the landscape helps us to further understand the Neolithic and Bronze Age."

The phrase "landscapes without parallel" has featured prominently in the material before the court.

7. The Stonehenge part of the WHS occupies about 25 sq. km and contains over 700 known archaeological features of which 415 are protected as parts of 175 scheduled ancient monuments under the Ancient Monuments and Archaeological Areas Act 1979 (see para. 6.11.1 of the Environmental Statement ("ES") for the project). For the assessment of impacts on heritage assets, either directly or upon their setting, the ES relied upon a primary study area up to 500m from the boundary of the proposed development. To address impacts on the setting of other high value assets a secondary study area was used extending to 2 km from that boundary. There are 255 scheduled monuments within the 2 km area, of which 167 fall entirely or partly within the WHS. Within that area there are also:-

    6 Grade I listed buildings
    14 Grade II* listed buildings
    209 Grade II listed buildings
    8 conservation areas.

8. There are 1142 known, non-designated heritage assets within the 500m study area, of which 11 would be directly impacted by the scheme. These 11 are relevant to ground 1(i) of the challenge.

9. Paragraphs 11.1.14 to 11.1.17 of the World Heritage Site Management Plan adopted on 18 May 2015 describe the background to the problem concerning the existing A303. Paragraph 11.1.14 states:-

> "…….. the A303 continues to have a major impact on the integrity of the wider WHS, the setting of its monuments and the ability of visitors to explore the southern part of the Site. The A303 divides the Stonehenge part of the WHS landscape into northern and southern sections diminishing its integrity and

> severing links between monuments in the two parts. It has significant impacts on the setting of Stonehenge and its Avenue as well as many other monuments that are attributes of OUV including a number of barrow cemeteries. The road and traffic represent visual and aural intrusion and have a major impact on the tranquillity of the WHS. Access to the southern part of the WHS is made both difficult and potentially dangerous by the road. In addition to its impacts on the WHS, reports indicate that the heavy congestion at certain times has a negative impact on the economy in the South West and locally and on the amenity of local residents."

10. Proposals to improve the A303 date back to the 1990s when the process of identifying alternative routes began. In 2002 the then Highways Agency proposed a dual carriageway scheme with a tunnel 2.1 km long running past Stonehenge. A public inquiry was held in 2004 (para. 11.1.15). The Inspector's report in 2005 recommended in favour of the scheme proceeding. But in view of increased tunnelling costs, the government decided to review whether the scheme still represented the best option for improving the A303 and the setting of Stonehenge, as well as value for money. The government concluded that, because of significant environmental constraints across the whole of the WHS, there were no acceptable alternatives to the 2.1 km tunnel, but the scheme costs could not be justified at that time. The need to find a solution for the negative impacts of the A303 remained a key challenge (para. 11.1.16). In 2014 the SST adopted a Road Investment Strategy ("RIS") for the purposes of the IA 2015 which identified the A303 corridor for improvements (para. 11.1.17). This included the scheme which became the subject of the application for the DCO.

11. In summary, IP1's scheme comprises the following components, running from west to east:-

- A northern bypass of Winterbourne Stoke
- A new grade-separated junction with twin roundabouts between the A303 and A360 to the west of, and outside, the WHS replacing the existing Longbarrow roundabout
- "The western cutting" – a new dual carriageway within the WHS in a cutting 1 km long connecting with the western portals of the tunnel
- A tunnel 3.3 km long running past Stonehenge
- A new dual carriageway from the eastern tunnel portals to join the existing A303 at a new grade-separated junction (with a flyover) between the A303 and A345 at the Countess roundabout, of which 1 km would be in cutting ("the eastern cutting").

The scheme includes a number of "green bridges." One bridge (150 m in width) over the western cutting would be located 150 m inside the western boundary of the WHS (which follows the line of the A360).

12. The proposals for the western cutting, western tunnel portals and the Longbarrow junction have attracted much opposition. In the current design, the cutting is about 1 km long, 7-11m deep, about 35m wide between retaining walls and 60m wide between the edges of sloping grass embankments (PR 2.2.14 and 5.7.221).

13. In 2017 the WHC expressed concerns that the proposed tunnel (then 2.9 km long) and cuttings would adversely affect the OUV and asked the UK to consider a non-tunnel bypass to the south of the WHS ("route F10") or a longer tunnel (approximately 5 km in length) which would remove the need for cuttings within the WHS. In 2019 the WHC commended the increase in the length of the tunnel to 3.3 km and the green bridge over the western cutting. However, it still expressed concerns about the exposed dual carriageways within the WHS, particularly the western cutting. The WHC urged the UK to pursue a longer tunnel "so that the western portal is located outside" the WHS. But it no longer asked the UK to pursue the F10 option.

14. The application for a DCO was the subject of a statutory examination before a panel of five inspectors between 2 April and 2 October 2019. The report of the Panel was submitted to the Department ("DfT") on 2 January 2020.

15. During the Examination the option of a longer tunnel of 4.5 km was considered. This would omit the western cutting.

16. In its report the Panel made the following observation about the western cutting at PR 5.7.225, in contrast to the removal of a surface road such as the existing A303:-

> "On the other hand, the current proposal for a cutting would introduce a greater physical change to the Stonehenge landscape than has occurred in its 6,000 years as a place of widely acknowledged human significance. Moreover, the change would be permanent and irreversible."

17. The Panel recommended that the DCO should not be granted (PR 7.5.25). In its final conclusions the Panel said that the scheme would have a "significantly adverse effect" on the OUV of the WHS, including its integrity and authenticity. Taking this together with it impact upon the "significance of heritage assets through development within their settings", the scheme would result in "substantial harm" (PR 7.5.11). The Panel considered that the benefits of the scheme would not be substantial and, in any event, would not outweigh the harm to the WHS (PR 7.5.21). In addition, the totality of the adverse impacts of the proposed scheme would strongly outweigh its overall benefits (PR 7.5.22). Those impacts included "considerable harm to both landscape character and visual amenity" (PR 7.5.12). Nonetheless, in PR 7.5.26 the Panel said this:-

> "….. the ExA recognises that its conclusions in relation to cultural heritage, landscape and visual impact issues and the other harms identified, are ultimately matters of planning judgment on which there have been differing and informed opinions and evidence submitted to the Examination." ("ExA" referring to the Examining Authority or Panel)

The Panel acknowledged that the SST might reach a different conclusion on adverse impacts, or the weight to be attached to planning benefits, and consequently on the overall planning balance, which might result in a DCO being granted.

18. In his decision letter the SST preferred the views of IP2 on the level of harm to the spatial, visual relations and settings of designated assets, namely that the harm would be "less than substantial" rather than "substantial" (DL 34). In DL 43 the SST specifically noted the concerns raised by interested parties and the Panel about the adverse impacts from the western cutting and portals, the Longbarrow junction and, to a lesser extent, the eastern approach. However, on balance, and taking into account the views of IP2 and Wiltshire Council, the SST concluded that any harm caused to the WHS as a whole would be less than substantial. In DL 80 the SST accepted advice from IP2 that the harm to "heritage assets, including the OUV," would be less than substantial. In DL 81 the SST disagreed with the Panel's views that the level of harm to the landscape would conflict with the National Policy Statement for National Networks ("NPSNN") and concluded that that harm would be outweighed by beneficial impacts throughout most of the scheme, so that landscape and visual impacts had a neutral effect rather than "considerable" negative weight, as the Panel had found. Ultimately, after weighing all the other considerations, the SST decided that the need for the scheme, together with its other benefits outweighed any harm (DL 87).

19. Plainly, this is a scheme about which strongly divergent opinions are held. It is therefore necessary to refer to what was said by the Divisional Court in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 553 at [6]:-

> "It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The Court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully."

20. The present judgment can only decide whether the decision to grant the DCO was lawful or unlawful. It would therefore be wrong for the outcome of this judgment to be treated as either approving or disapproving the project. That is not the court's function.

21. I would like to express my gratitude to counsel for their helpful written and oral submissions and to the legal teams for the assistance they have given. In particular, the parties are to be commended for having produced a very helpful and comprehensive statement of common ground ("SOCG").

22. The claimant raises 5 grounds of challenge which it has summarised in paragraph 7 of its skeleton:-

> **Ground 1**: By considering the impact on the 'historic environment' as a whole, rather than assessing the impact on individual assets (as the applicable policies required), the Secretary of State has unlawfully failed to comply with and apply the NPSNN and the applicable local development plan policies. The Secretary of State has, in any event, unlawfully failed to give adequate and intelligible reasons as to (1) the significance of each of the affected heritage assets (2) the impact upon each asset and (3) the weight to be given to that impact.
>
> **Ground 2:** The Secretary of State disagreed with the assessment of his Expert Panel, without - unlawfully - there being any proper evidential basis for so doing. That happened in part because the Secretary of State misconstrued the advice of Historic England. In any event, the Secretary of State's reasons for disagreeing with the advice of his Expert Panel were unlawfully inadequate and unintelligible.
>
> **Ground 3:** The Secretary of State adopted an unlawful approach to the consideration of heritage harm under paragraphs 5.131-5.134 of the NPSNN.
>
> **Ground 4:** The Secretary of State's approach to the World Heritage Convention was unlawful.
>
> **Ground 5:** The Secretary of State failed to consider mandatory material considerations, namely: (i) the breach of various local policies, (ii) the impact of his finding of heritage harm which undermined the business case for the proposal and (iii) the existence of at least one alternative.

23. On 16 February 2021 I ordered that the application for permission to apply for judicial review be adjourned to a "rolled up" hearing at which both the question of permission and substantive legal issues would be considered. A case management hearing took place on 23 February 2021 at which the parties successfully co-operated in putting forward directions to enable the court to handle the issues, and the potentially large amount of material, fairly and efficiently.

24. On 7 April 2020 the claimant made an application for permission to amend the Statement of Facts and Grounds to add ground 6, which alleged that the decision to grant the DCO had been vitiated by actual or apparent pre-determination and for an order for disclosure in relation to that ground. The application was opposed and on 18 May 2021 Waksman J refused it on the papers. The claimant renewed its application to an oral hearing and the matter came before me on 10 June 2021. Like Waksman J, I found the proposed new ground to be wholly unarguable and so dismissed the application. The judgment is at [2021] EWHC 1642 (Admin).

25. The remainder of this judgment is set out under the following headings:-

Planning legislation for nationally significant infrastructure projects

26. The proposed development is a nationally significant infrastructure project for the purposes of the PA 2008. Accordingly, development consent is required under that legislation (s.31). The requirements to obtain other approvals such as planning permission and scheduled ancient monument consent are disapplied by s.33.

27. The statutory framework for the designation of national policy statements and for obtaining a DCO has been summarised in a number of recent cases and need not be repeated here (see e.g. *R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787 at [5]-[8]; *R (Spurrier) v Secretary of State for Transport* at [21]-[40] and [91]-[112]; *R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] PTSR 1709 at [26]-[52] and [105]-[116]; [2021] EWCA Civ 43 at [67-68] and [104 - 105]); *R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [19]-[38]). None of the analysis in those passages was in dispute here.

28. Section 66(1) and 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 do not apply to the determination of applications for a DCO. But instead regulation 3 of the Infrastructure Planning (Decision) Regulations 2010 (SI 2010 No. 305) ("the 2010 Regulations") provides:-

> " (1) When deciding an application which affects a listed building or its setting, the Secretary of State must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.
>
> (2) When deciding an application relating to a conservation area, the Secretary of State must have regard to the desirability of preserving or enhancing the character or appearance of that area.
>
> (3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the Secretary of State must have regard to the desirability of preserving the scheduled monument or its setting."

29. The project constituted EIA development to which the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) ("the EIA Regulations 2017") applied.

30. Regulation 4(2) prohibits the granting of a DCO "unless an EIA has been carried out in respect of that application." Regulation 5(1) defines EIA as a process consisting of (a) the preparation of an ES, (b) compliance with publicity, notification and consultation requirements in the EIA Regulations 2017 on the application and the ES, and (c) compliance in this case with regulation 21.

31. Regulation 21(1) imposed the following obligations on the Secretary of State:-

> "When deciding whether to make an order granting development consent for EIA development the Secretary of State *must*—

> (a) examine the environmental information;
>
> (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary;
>
> (c) integrate that conclusion into the decision as to whether an order is to be granted; and
>
> (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures."

"Environmental information" is defined by regulation 3(1) as including the ES, any further information added to the ES, and representations made by consultees or other persons about the effects of the development on the environment.

32. The EIA "must identify, describe and assess in an appropriate manner" "the direct and indirect significant effects of the proposed development" on *inter alia* "cultural heritage" (regulation 5(2)).

33. Regulation 14 defines what must be contained in an ES, including "the likely significant effect of the proposed development on the environment" (regulations 14(2)(b) and also:-

> "a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment" (regulation 14(2)(d))

This is repeated in paragraph 2 of schedule 4 (linked to regulation 14(2)(f)). Paragraph 3 of schedule 4 requires the ES to contain a description of the relevant aspects of the current state of the environment, the "baseline scenario." As we shall see, the effects of the current A303 on the environment, including heritage assets, formed an important part of the assessment of the changes in environmental impact resulting from the proposed scheme.

34. Regulation 5(5) provides

> "The Secretary of State or relevant authority, as the case may be, must ensure that they have, or have access as necessary to, sufficient expertise to examine the environmental statement or updated environmental statement, as appropriate."

This provision acknowledges that a Minister or relevant authority may not themselves have "sufficient expertise" to examine the ES, particularly as such a document may cover a wide range of specialist topics. It is sufficient that the decision-maker has "access" to sufficient expertise for that purpose. That expertise will include the officials within the Minister's department and also the Panel of Inspectors reporting on its

assessment of the environmental information and of the statutory examination of the application for a DCO.

35. Because in this case an NPS had taken effect, s.104 of the PA 2008 was applicable. Accordingly, by s.104(2) the SST was required to have regard to *inter alia* the NPSNN. Section 104(3) required the SST to "decide the application in accordance with" the NPSNN "except to the extent that one or more of subsections (4) to (8) applies." Section 104(4) to (8) provides:-

> "(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.
>
> (5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.
>
> (6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.
>
> (7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.
>
> (8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met."

The legal issues in this case are particularly concerned with s.104(3),(4) and (7). It is common ground that the World Heritage Convention was an "international obligation" falling within s.104(4).

36. Section 116 of the PA 2008 imposes a duty on the SST to give reasons for a decision to grant or refuse a DCO.

National Policy Statement for National Networks

37. The NPSNN was published on 17 December 2014 and formally designated under s.5 of the PA 2008 on 14 January 2015 following consideration by Parliament in accordance with ss.5(4) and 9.

38. Paragraph 4.2 of the NPSNN sets out a presumption in favour of granting a DCO in these terms:-

> "Subject to the detailed policies and protections in this NPS, and the legal constraints set out in the Planning Act, there is a

> presumption in favour of granting development consent for national networks NSIPs that fall within the need for infrastructure established in this NPS. The statutory framework for deciding NSIP applications where there is a relevant designated NPS is set out in Section 104 of the Planning Act."

39. Paragraph 4.3 provides:-

> "4.3 In considering any proposed development, and in particular, when weighing its adverse impacts against its benefits, the Examining Authority and the Secretary of State should take into account:
>
> - its potential benefits, including the facilitation of economic development, including job creation, housing and environmental improvement, and any long-term or wider benefits;
>
> - its potential adverse impacts, including any longer-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts."

40. Paragraph 4.5 lays down a requirement for a business case:-

> "Applications for road and rail projects (with the exception of those for SRFIs, for which the position is covered in paragraph 4.8 below) will normally be supported by a business case prepared in accordance with Treasury Green Book principles. This business case provides the basis for investment decisions on road and rail projects. The business case will normally be developed based on the Department's Transport Business Case guidance and WebTAG guidance. The economic case prepared for a transport business case will assess the economic, environmental and social impacts of a development. The information provided will be proportionate to the development. This information will be important for the Examining Authority and the Secretary of State's consideration of the adverse impacts and benefits of a proposed development……"

This paragraph is relevant to ground 5(ii).

41. Paragraphs 4.26 and 4.27 deal with alternatives to a proposal:-

> " 4.26 Applicants should comply with all legal requirements and any policy requirements set out in this NPS on the assessment of alternatives. In particular:
>
> - The EIA Directive requires projects with significant environmental effects to include an outline of the main alternatives studied by the applicant and an indication of the

> main reasons for the applicant's choice, taking into account the environmental effects.
>
> • There may also be other specific legal requirements for the consideration of alternatives, for example, under the Habitats and Water Framework Directives.
>
> • There may also be policy requirements in this NPS, for example the flood risk sequential test and the assessment of alternatives for developments in National Parks, the Broads and Areas of Outstanding Natural Beauty (AONB).
>
> 4.27 All projects should be subject to an options appraisal. The appraisal should consider viable modal alternatives and may also consider other options (in light of the paragraphs 3.23 to 3.27 of this NPS). Where projects have been subject to full options appraisal in achieving their status within Road or Rail Investment Strategies or other appropriate policies or investment plans, option testing need not be considered by the examining authority or the decision maker. For national road and rail schemes, proportionate option consideration of alternatives will have been undertaken as part of the investment decision making process. It is not necessary for the Examining Authority and the decision maker to reconsider this process, but they should be satisfied that this assessment has been undertaken."

42. Paragraphs 5.120 to 5.142 deal with the historic environment. Paragraph 5.122 explains the concepts of "heritage asset" and "significance":-

> "Those elements of the historic environment that hold value to this and future generations because of their historic, archaeological, architectural or artistic interest are called 'heritage assets'. Heritage assets may be buildings, monuments, sites, places, areas or landscapes. The sum of the heritage interests that a heritage asset holds is referred to as its significance. Significance derives not only from a heritage asset's physical presence, but also from its setting."

43. The categories of designated heritage assets include not only listed buildings and conservation areas but also world heritage sites and scheduled ancient monuments (para. 5.123). But paragraph 5.124 provides that certain non-designated assets of archaeological interest should be subject to the policies applied to designated assets:-

> "Non-designated heritage assets of archaeological interest that are demonstrably of equivalent significance to Scheduled Monuments, should be considered subject to the policies for designated heritage assets. The absence of designation for such heritage assets does not indicate lower significance."

This paragraph is relevant to ground 1(i).

44. Paragraphs 5.128 and 5.129 state that the Secretary of State should seek to identify and assess the significance of any heritage asset which, or the setting of which, may be affected by a proposed development, including the nature of that significance and the value of the asset. Paragraph 5.129 says:-

> "In considering the impact of a proposed development on any heritage assets, the Secretary of State should take into account the particular nature of the significance of the heritage asset and the value that they hold for this and future generations. This understanding should be used to avoid or minimise conflict between their conservation and any aspect of the proposal"

45. Para.5.130 states:-

> "The Secretary of State should take into account the desirability of sustaining and, where appropriate, enhancing the significance of heritage assets, the contribution of their settings and the positive contribution that their conservation can make to sustainable communities – including their economic vitality….."

46. Paragraphs 5.131 and 5.132 set out the following general principles:-

> "5.131 When considering the impact of a proposed development on the significance of a designated heritage asset, the Secretary of State should give great weight to the asset's conservation. The more important the asset, the greater the weight should be. Once lost, heritage assets cannot be replaced and their loss has a cultural, environmental, economic and social impact. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. Given that heritage assets are irreplaceable, harm or loss affecting any designated heritage asset should require clear and convincing justification. Substantial harm to or loss of a grade II Listed Building or a grade II Registered Park or Garden should be exceptional. Substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, Scheduled Monuments, grade I and II* Listed Buildings, Registered Battlefields, and grade I and II* Registered Parks and Gardens should be wholly exceptional.
>
> 5.132 Any harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of development, recognising that the greater the harm to the significance of the heritage asset, the greater the justification that will be needed for any loss."

47. Paragraphs 5.133 and 5.134 lie at the heart of much of the claimant's case under grounds 1 to 3. They set out what was described in argument as a "fork in the road" in the decision-making process. The policy test to be applied is more strict where a proposal would cause "substantial harm" to, or total loss of, the significance of a designated heritage asset, as opposed to "less than substantial harm." In the former case,

"substantial public benefits" are required to outweigh the heritage loss or harm, which must also be shown to be necessary in order to deliver those benefits. In the latter case, the policy simply requires the heritage harm to be weighed against "public benefits":-

> "5.133 Where the proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm, ……
>
> 5.134 Where the proposed development will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

48. It is common ground for the purposes of this claim that there is no material difference between paragraphs 5.133 and 5.134 of the NPSNN and their counterparts in paragraphs 195 and 196 of the National Planning Policy Framework ("NPPF") (SOCG at paras. 63-4).

Development plan and other policies

Wiltshire Core Strategy

49. Wiltshire Council adopted the Wiltshire Core Strategy in January 2015 as part of the statutory development plan.

50. Core Policy 6 states:-

> "**Stonehenge**
> The World Heritage Site and its setting will be protected so as to sustain its Outstanding Universal Value in accordance with Core Policy 59. ....."

51. Core Policy 58 states:-

> "**Ensuring the conservation of the historic environment**
> Development should protect, conserve and where possible enhance the historic environment. Designated heritage assets and their settings will be conserved, and where appropriate enhanced in a manner appropriate to their significance, including:
>
> i. nationally significant archaeological remains
>
> ii. World Heritage Sites within and adjacent to Wiltshire
>
> iii. buildings and structures of special architectural or historic interest

iv. the special character or appearance of conservation areas

v. historic parks and gardens

vi. important landscapes, including registered battlefields and townscapes.

Distinctive elements of Wiltshire's historic environment, including non-designated heritage assets, which contribute to a sense of local character and identity will be conserved, and where possible enhanced. The potential contribution of these heritage assets towards wider social, cultural, economic and environmental benefits will also be utilised where this can be delivered in a sensitive and appropriate manner in accordance with Core Policy 57 (Ensuring High Quality Design and Place Shaping)....."

52. Core Policy 59 states:-

"**The Stonehenge, Avebury and associated sites World Heritage Site**
The Outstanding Universal Value (OUV) of the World Heritage Site will be sustained by:

i. giving precedence to the protection of the World Heritage Site and its setting

ii. development not adversely affecting the World Heritage Site and its attributes of OUV. This includes the physical fabric, character, appearance, setting or views into or out of the World Heritage Site

iii. seeking opportunities to support and maintain the positive management of the World Heritage Site through development that delivers improved conservation, presentation and interpretation and reduces the negative impacts of roads, traffic and visitor pressure

iv. requiring developments to demonstrate that full account has been taken of their impact upon the World Heritage Site and its setting. Proposals will need to demonstrate that the development will have no individual, cumulative or consequential adverse effect upon the site and its OUV. Consideration of opportunities for enhancing the World Heritage Site and sustaining its OUV should also be demonstrated. This will include proposals for climate change mitigation and renewable energy schemes."

The Stonehenge World Heritage Site Management Plan

53. This document contains a number of detailed policies. Policy 1d states:-

> "Development which would impact adversely on the WHS, its setting and its attributes of OUV should not be permitted"

54. Policy 3c states:-

> "Maintain and enhance the setting of monuments and sites in the landscape and their interrelationships and astronomical alignments with particular attention given to achieving an appropriate landscape setting for the monuments and the WHS itself."

55. Policy 6a states:-

> "Identify and implement measures to reduce the negative impacts of roads, traffic and parking on the WHS and to improve road safety and the ease and confidence with which residents and visitors can explore the WHS."

The World Heritage Convention

56. Article 1 defines "cultural heritage" in terms of monuments (including elements or structures of an archaeological nature), groups of buildings and sites which are of "outstanding universal value."

57. Article 3 provides that it is for each State Party to the Convention to identify properties within its territory falling within *inter alia* Article 1. Each State Party must submit to the WHC an inventory of all such properties (article 11(1)). From that inventory the WHC compiles and publishes a list of those properties which "it considers as having outstanding universal value" (article 11(2)).

58. Articles 4 and 5 lie at the heart of the claimant's ground 4. They state:-

> "**Article 4**
>
> Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.
>
> **Article 5**
>
> To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this

> Convention shall endeavour, in so far as possible, and as appropriate for each country:
>
> (a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
>
> (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
>
> (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;
>
> (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
>
> (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field."

59. The WHC has issued "Operational Guidelines for the Implementation of the World Heritage Convention" (July 2019). Paragraphs 77 – 78 set out criteria for identifying whether an asset has OUV to merit inscription as a WHS. Paragraph 78 states that a property "must also meet the conditions of *integrity* and *authenticity* and must have an adequate protection and management system to ensure its safeguarding". The concepts of authenticity and integrity are explained respectively in paragraphs 79 to 86 and 87 to 95. Authenticity is concerned with the ability to understand the value attributable to a heritage asset (para. 80). Properties meet the conditions of authenticity if "their cultural values …. are truthfully and credibly expressed through a variety of attributes …." which include location and setting (para. 82). Integrity is "a measure of the wholeness and intactness of the natural and/or cultural heritage and its attributes" (para. 88). Paragraph 96 states that "Protection and management of World Heritage properties should ensure that their Outstanding Universal Value, including the conditions of integrity and/or authenticity at the time of inscription, are sustained or enhanced over time." The Panel summarised the concepts of integrity and authenticity in its report at PR 5.7.314 and 5.7.317-8.

Legal principles

60. The parties have helpfully agreed in the SOCG a number of legal principles which it is appropriate to record in Appendix 1 to this judgment.

61. With regard to paragraph 1e of the Appendix and the law on "obviously material considerations", *ClientEarth* [2020] PTSR 1709 at [99] has been approved by the Court of Appeal in *R (Oxton Farm) v Harrogate Borough Council* [2020] EWCA Civ 805 at [8]. The principles have been set out more fully by the Supreme Court in *R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [116-121].

62. On the issue of whether as a matter of fact a Minister did take into account a particular factor, it is well-established that a Minister only has regard to matters of which he knows or which are drawn to his attention, for example in briefing material or by a precis (see *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26-38] and *Revenue and Customs Commissioners v Tooth* [2021] 1WLR 2811 at [70]).

63. However, the mere fact that a Minister did not know about, or have his attention drawn to, a relevant consideration is insufficient by itself to vitiate his decision. A claimant needs to go further and demonstrate that relevant legislation mandated, expressly or by implication, that the consideration be taken into account. Otherwise, he must show that the consideration was so "obviously material" that a failure to take it into account would be irrational; it would not accord with the intention of the legislation. This is the familiar irrationality test in *Wednesbury* (see *National Association of Health Stores* at [62-3] and [73-5]; *Oxton Farm* at [8]; *Friends of the Earth* at [116-9]).

64. In *National Association of Health Stores* the Court of Appeal approved the following passages from the decision of the High Court of Australia in *Minister for Aboriginal Affairs v Peko-Wallsend* [1986] HCA 40; (1986) 162 CLR 24):- Gibbs CJ held at [3]:-

> "Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law."

Brennan J held at [18]:-

> "A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within his knowledge relating to the matter. The facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered.
>
> and at [27]:-

> The Department does not have to draw the Minister's attention to every communication it receives and to every fact its officers know. Part of a Department's function is to undertake an analysis, evaluation and precis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. The consequence of supplying a departmental analysis, evaluation and precis is, of course, that the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the facts does not protect the decision. The Parliament can be taken to intend that the Minister will retain control of the process of decision-making while being assisted to make the decision by departmental analysis, evaluation and precis of the material relevant to that decision."

65. It is plain from these authorities that in considering the legal adequacy of the briefing provided to a Minister, it is necessary to have regard to the nature, scope and purpose of the legislation in question, including any matters expressly required to be taken into account, and the nature and extent of any matter which has not been addressed. It is also lawful for a ministerial decision to be reached following evaluation and analysis by experienced officials in the department and a briefing which provides a precis of material which the Minister is "bound to have regard to." To some extent, the preparation of a ministerial briefing involves judgment on the part of officials about the material to be included. In this respect, there is a broad analogy to be drawn with the approach taken by the courts to challenges to an officer's report prepared to brief the members of a local authority's committee on a planning application (see e.g. *R (Luton Borough Council) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin) at [91]-[94]).

66. Regulation 5(5) of the EIA Regulations 2017 does not impinge upon the legal principles above on the extent of the matters which a Minister may be taken to have known about when he reaches a decision. The adequacy of the expertise of Inspectors or officials is not to be confused with the legal adequacy of the briefing materials made available to a Minister to inform him of all the matters which he is legally obliged to take into account.

67. In the present case it is common ground that the relevant briefing materials before the SST comprised the Panel's report and the draft decision letter prepared by officials, as well as the briefing notes they submitted from time to time. Mr Strachan QC said on instructions that there was no material difference between the draft decision letter which accompanied the final briefing note and the formal decision issued on 12 November 2020 following final Ministerial approval on 5 November. The claimant did not ask the

court to require the draft to be produced and did not take issue with that position. In effect, the parties have been content to proceed on the basis that Mr Strachan's statement is correct.

The Environmental Statement

68. As the Panel reported (PR 5.7.18.) chapter 6 of the ES with its appendices, assessed the effect of the proposed development on the significance of designated and non-designated heritage assets (including the WHS) within the two study areas, either through physical impact or by affecting their setting. A separate Heritage Impact Assessment ("HIA") was provided to deal with the impact of the scheme on the OUV of the WHS. It addressed both designated and non-designated assets, both within and without the WHS, relevant to its OUV, together with impacts on the character of the setting of the WHS (PR 5.7.22) in accordance with Guidance issued by the International Council on Monuments and Sites ("ICOMOS") (see ES paras. 6.3.1 to 6.3.2).

69. Chapter 3 of the ES dealt with IP1's assessment of alternative options to the proposed scheme.

70. The ES described in a conventional manner the significance of the scheme's effects on assets, using criteria to assess the significance or value of the asset, the "setting contribution" and the magnitude of the impact, whether adverse or beneficial (PR 5.7.20).

71. Paragraph 6.6.59 of the ES explains that for the assessment in the ES and HIA of both the baseline scenario (with the existing A303) and the impacts of the proposed scheme, the analysis identified some 39 "asset groupings" to reflect the disposition and significance of some of the monuments within the WHS and wider landscape. This was said to be an established approach endorsed in a joint mission report by the WHS and ICOMOS in 2015. IP2 agreed with this approach in the present case. "The consideration of related assets as part of groups allows for the potential of different levels and types of impact on individual components of individual asset groups extending over large areas to be assessed" (paras. 6.10.6 to 6.10.8 of IP2's representations to the Panel in May 2019). In addition, the ES and HIA made assessments of the impacts on certain individual assets and their settings.

72. The ES arrived at a range of impacts on different assets from different parts of the scheme, some adverse, some neutral and some beneficial. In particular, this was not a proposal for an entirely new road. The scheme would *remove* the existing A303 which, it is generally accepted, has its own detrimental impacts on heritage assets. Accordingly, it was unavoidable that in assessing the impacts of the proposal on any particular asset or grouping of assets, the judgments expressed in the ES and HIA had to compare the effects of the existing A303 as part of the baseline. To do otherwise would have been unrealistic. That approach was not criticised during the hearing. In some instances the ES state that the proposed scheme would improve the existing position by reducing the level of net harm or producing a net benefit, in others the end result is assessed as harmful *per se*.

73. IP1's overall assessment was that the proposed development would not cause substantial harm to any designated heritage asset, and for many the effects would be beneficial. It was then said that the substantial benefits of the scheme would outweigh

the less than substantial harm caused to the significance of some heritage assets (PR 5.7.21).

74. The HIA assessed the proposed scheme in relation to the 7 attributes of the OUV of the WHS:-

> "(1) Stonehenge itself as a globally famous and iconic monument.
>
> (2) The physical remains of the Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the landscape.
>
> (3) The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the landscape.
>
> (4) The design of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the skies and astronomy.
>
> (5) The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to each other.
>
> (6) The disposition, physical remains and settings of the key Neolithic and Bronze Age funerary, ceremonial and other monuments and sites of the period, which together form a landscape without parallel.
>
> (7) The influence of the remains of the Neolithic and Bronze Age funerary and ceremonial monuments and their landscape setting on architects, artists, historians, archaeologists and others."

The HIA also assessed the effect of the development on the "authenticity" and the "integrity" of the WHS.

75. IP1 concluded that the scheme would have a slightly adverse effect on two OUV attributes but a beneficial effect on the remaining five. They also judged that the proposal would have a slightly beneficial effect on the authenticity and integrity of the WHS and thus, viewed overall, a slightly beneficial effect on all three criteria, OUV attributes, authenticity and integrity (PR 5.7.25).

76. Many of the impacts of the proposed development do not involve direct loss of assets. They are the subject of mitigation measures in the Outline Environmental Management Plan ("OEMP") and the Detailed Archaeological Mitigation Strategy ("DAMS"). The former effectively provides a code of construction practice and the latter a detailed framework for the preparation, approval and implementation of plans for site-specific investigation and archaeological method statements (PR 5.7.33). The OEMP and DAMS are themselves important documents which gave rise to significant issues during the Examination (see the Panel's "second main issue" at PR 5.7.151-5.7.205).

77. The Panel summarised IP1's case on the *overall* heritage benefits of the scheme at PR 5.7.29:-

> "• The removal of the A303 and its traffic will greatly improve the setting of the stone circle and numerous monuments and monument groups across the central part of the WHS. Visitors will be able to appreciate the stone circle and interrelationships with numerous monuments and monument groups without the sight and sound of traffic intruding on their experience. This will help to conserve and enhance the WHS and sustain its OUV.
>
> • The Scheme will also remove the intrusion of vehicles and vehicle lights upon the mid-winter sunset solstitial alignment and restore the relationship between the stone circle and the Sun Barrow. It will also allow the removal of the lit junction at Longbarrow Roundabout, which currently results in night-time light spill and light pollution on the western edge of the WHS, contributing to improvements in the experience of dark skies.
>
> • The removal of the A303 will reconnect the Avenue where it is currently severed by the existing road.
>
> • The existing road as it passes through the WHS will be altered for use by NMUs allowing safer exploration of the WHS east to west.
>
> • The Scheme would afford safer NMU connections using north-south Public Rights of Way, currently severed by the existing surface A303.
>
> • Removal of Longbarrow Roundabout and the conversion of the A303 and part of the A360 to NMU routes, immediately adjacent to the Winterbourne Stoke Crossroads complex of burial mounds, will allow improvements to the immediate landscape context and setting of this important barrow group.
>
> • The construction of the Scheme will improve visitor's enjoyment and experience of the WHS landscape as a whole and provide opportunities for improved interpretation and presentation of the WHS.
>
> • The construction of the Scheme will require advanced archaeological works to record archaeological remains in advance of Proposed Development construction. This will present educational and community outreach opportunities working sensitively and in close collaboration with key heritage stakeholders."

Views of parties at the Examination

78. A number of parties strongly opposed the proposal. The claimant comprised a group of five NGOs, which included the British Archaeological Trust. They criticised the ES and HIA and supported the objections of the Consortium of Archaeologists ("COA") and the Council for British Archaeology ("CBA") (see e.g. PR at 5.7.105-5.7.128). The

concerns and objections of the WHC and ICOMOS were summarised at, for example, PR 5.7.73-5.7.79 and 5.7.84-5.7.98.

79. Wiltshire Council, as the local planning authority, provided a local impact report under s.60 of the PA 2008, addressing the impact of the scheme on the authority's area. The Council considered that the removal of the existing A303 would be beneficial to the setting of Stonehenge and many groups of monuments contributing to its OUV. The removal of the existing Longbarrow roundabout would also bring benefits to the Winterbourne Stoke group of barrows.

80. The Council considered that the most significant negative impact would be from the dual carriageway, cutting and portals in the western part of the WHS. There would be harmful visual effects, impacts on the settings of key monument groups expressing attributes of the OUV and spatial severance, which would be difficult to avoid with the length of tunnel proposed. The Council accepted that the principles and commitments in the OEMP would enable the detailed design to accord with the aims and objectives of the WHS Management Plan and sustain the OUV. But the Council remained concerned about the visual impact on monuments and their settings at the western end of the scheme. Although harm could be mitigated to some extent by the use of green infrastructure and other design solutions, the failure to reduce the impact by providing additional cover to the western cutting was a missed opportunity (PR 5.7.55-5.7.61).

81. A statement of common ground agreed between the Council and IP1 noted that there was general agreement as to the likely extent of the impacts of the scheme and that the Council agreed that there are no aspects which are likely to reach the level of "substantial harm" (DL 43). The Council considered the proposal to be "in accordance with the large majority of policies" in the development plan, subject to appropriate mitigation being carried out by IP1 of potential harmful effects identified in the ES. By the end of the Examination, the Council and IP1 agreed that there were no outstanding policy issues (PR 4.5.6 and 4.5.8).

82. The National Trust owns and manages 850 hectares of the Stonehenge landscape within the WHS. It welcomed the government's intention to invest in a bored tunnel to remove a large part of the existing A303. If well designed and delivered with the utmost care for archaeology and the landscape, it could provide an overall benefit to the WHS. The Trust was satisfied that design and delivery controls had been developed through the DAMS and OEMP to provide necessary reassurance and that other concerns had been overcome (PR 5.7.70-5.7.71).

83. The English Heritage Trust manages over 400 historic buildings, monuments and sites across the country, including the Stonehenge monument itself. In a statement of common ground agreed with IP1, the Trust said that it was supportive of the project, because it has the potential to transform the Stonehenge area of the WHS and make significant improvements to the setting of the Stonehenge monument (see SOCG in these proceedings at paras. 34-35).

84. The position of IP2 at the Examination has been summarised in paragraphs 24 to 27 of the SOCG agreed between the parties and by the Panel at PR 5.7.62 to 5.7.69.

85. In addition, I note that in its representations in May 2019, IP2 stated that it was supportive of the objectives of the scheme. It had been instrumental in securing the

government's commitment to invest in a bored tunnel at least 2.9 km long. But a number of matters needed to be addressed to ensure the delivery of those objectives and potential benefits for the OUV of the WHS (paras 1.16 to 1.17, 4.9.2, 6.10.12 *et seq* and 8.11). IP2 focused primarily on the WHS and on those scheduled monuments affected by the scheme, whether contributing to the OUV or not, and whether inside or outside the WHS (para.3.9). But it had considered all parts of the ES relevant to cultural heritage as well as the HIA (paras. 3.10 and 6.3). In November 2017 IP2 had specifically identified the need for the ES to address non-designated heritage assets (para 4.10.4). IP2's representations to the Examination identified those specific areas where it had concerns or further information was needed.

86. In PR 5.7.329 the Panel pinpointed the key difference between its overall assessment on the effect of the scheme on cultural-heritage and that of IP2, namely it considered the harm to be substantial whereas the latter considered it to be less than substantial. The Panel's explanation for this was the weight it placed on the effects of the western cutting and the Longbarrow junction (see PR 5.7.330).

The Panel's report

87. The Panel's report is over 500 pages long covering many topics and issues. However, the court was asked to focus primarily on sections dealing with heritage impact and the overall balance. Even so, the section dealing with heritage impact alone runs to over 50 pages. The Panel's conclusions on heritage matters occupy some 30 pages, running from PR 5.7.129 to 5.7.333. But it is only necessary for this judgment to focus on certain of the issues which affect the claimant's grounds of challenge.

88. At the outset of its assessment the Panel identified five "main issues":-

> (1) Whether the analysis and assessment methodology is appropriate;
>
> (2) Whether the mitigation strategy, and its effectiveness in the protection of WHS archaeology, is appropriate;
>
> (3) The effects of the proposed development on spatial relations, visual relations, and settings;
>
> (4) Cumulative and in-combination effects;
>
> (5) Effects on WHS OUV and the historic environment as a whole.

89. It is primarily the Panel's conclusions on the third and fifth main issues which are relevant to grounds 1 to 3 of this challenge. However, it is convenient to summarise the Panel's conclusions on the other main issues first.

90. On the first main issue the Panel concluded at PR 5.7.150:-

> "The ExA considers the analysis and assessment methodology appropriate subject to the points of criticism set out. It does not necessarily agree with the Applicant's assessments. Particular

> points will be examined in the remainder of this section of the Report."

Although the second sentence in that paragraph is ambiguous, the defendant and IP1 say that the third sentence shows that the Panel accepted the analysis in the ES and HIA, save for where the contrary is expressly stated. The position taken in those documents was that the scheme would not cause "substantial harm" to any designated asset (see e.g. PR 5.7.21).

91. Under the first main issue, the Panel considered that, subject to a number of concerns identified in its report, the HIA was generally comprehensive and provided a sufficient level of detail (para 5.7.138). But the Panel said that the HIA should have given more consideration to the effect of the Longbarrow junction on the setting of the WHS as a whole (para.5.7.139). Furthermore, the assessment of impact on settings had largely been concerned with "static views" rather than "the less tangible aspects of setting that relate to the WHS as a whole", including the overall significance of the site and "the succession of impressions which lead cumulatively to an overall sensory and intellectual construct of the site" which is important (paras.5.7.143 to 5.7.145). This last point was linked to a paper by D Roberts *et al* (2018) on the distribution of long barrows within the Stonehenge landscape (PR 5.7.144). The Panel substantially relied upon the thinking in this paper when it came to express its conclusions on the third main issue (see below).

92. In relation to the second main issue, the Panel judged the proposed mitigation strategy to be adequate, provided that issues relating to the sampling strategy for the investigation of archaeological features together with other identified concerns were resolved. Such matters were addressed in post-examination consultation carried out by the SST as the Panel had envisaged at PR 5.7.328. There is no legal challenge that the SST failed to address those matters properly.

93. On the fourth main issue, and leaving to one side its criticisms under the third and fifth main issues, the Panel agreed with the ES's overall conclusions on cumulative and in-combination effects (para.5.7.305).

94. On the third main issue, part of the Panel's analysis was concerned with the effect of the proposal on listed buildings and conservation areas. The Panel concluded that the effects of the proposed development on the settings of assets lying beyond "three main elements" would be acceptable (PR 5.7.296). Those matters are not relevant, therefore, to the difference between the Panel and the SST as to whether the proposal would cause "substantial" or "less than substantial harm" to the heritage assets.

95. The "three main elements" were identified in PR 5.7.207 as:-

> (1) the western approach, cutting and portals;
>
> (2) the proposed Longbarrow junction;
>
> (3) "and to a lesser extent, the eastern approach and portal."

It will be recalled that it was the first two elements upon which the Panel relied when expressing its disagreement with IP2 that the harm would be "less than substantial" (PR 5.7.329-5.7.330).

96. In relation to each of these three elements the Panel set out its conclusions on its effects on the OUV of the WHS and on the settings of heritage assets. But before embarking upon that exercise, the Panel returned in PR 5.7.212 to 5.7.215 to the paper by D Roberts *et al*. The landscape setting of long barrows is important to such matters as their alignment, intervisibility, relationship with other Early Neolithic monuments and evidence of routes for movement. The Panel subsequently referred to this very specific landscape concept as "the landscape settings of monuments" (similarly the reference to "an unparalleled historic landscape"), which should not be confused with the typical assessment of landscape and visual impact as part of a general planning appraisal.

97. Dealing with the western cutting and portals, the Panel concluded that, in particular, attributes (3), (5), and (6) of the OUV of the WHS would be greatly harmed or would suffer major harm (PR 5.7.226-5.7.230). In relation to settings, the Panel emphasised the need to consider not only visual aspects, but also contextual relationships, including the presence of archaeological features in the landscape; these aspects being similar to those considered when assessing the effect on the OUV of the WHS. Having regard to its earlier findings, the Panel considered that the western cutting and portals would cause "substantial harm" to the settings of designated assets (PR 5.7.233 to 5.7.236). Much of the Panel's reasoning concerned the visual effects of this part of the scheme and the impact on the landscape in which the archaeological features are set (see e.g. PR 5.7.219 to 5.7.224, 5.7.227, 5.7.229 and 5.7.232 to 5.7.234).

98. The Panel described the second element, the new Longbarrow junction, as being of motorway scale, albeit sunk into the ground with substantial earthworks. The pattern of the junction's landform would be at odds with the surrounding smaller scale morphology of small rectilinear fields and small groupings of traditional buildings. The junction, together with the western cutting and portals, would represent a single, very large, and continuous civil engineering work spanning the western boundary of the WHS. The effects of the junction on the OUV of the WHS would be similar to those of the western cutting and portal (PR 5.7.242 to 5.7.245). As with that first element, a good deal of the Panel's reasoning concerned the visual impacts of the junction and the impact on the landscape in which the archaeological features are set (see e.g. PR 5.7.243 to 5.7.245 and 5.7.247). At PR 5.7.247 the Panel concluded:-

> "…….. Also, the harm to the overall assembly of monuments, sites, and landscape through major excavations and civil engineering works, of a scale not seen before at Stonehenge. Whilst the existing roads could be removed at any time, should a satisfactory scheme be put forward, leaving little permanent effect on the cultural heritage of the Stonehenge landscape, the effects of the proposed junction would be irreversible."

They also found that the proposal would cause substantial harm as regards the OUV and settings (PR 5.7.248).

99. The Panel considered that the effect of the eastern cutting would be very much less severe than the western cutting (PR 5.7.254 to 5.7.255). The Panel found that there

would be harm to the landscape values of the OUV, but neutral or slightly positive effects for attribute (3) and for attribute (6) (PR 5.7.256 to 5.7.257). At PR 5.7.258 to 5.7.279 the Panel assessed harm caused to a number of heritage assets, ranging from negligible, slight or small to moderate in one instance (PR 5.7.259) and great harm from the flyover at the Countess Road junction (PR 5.7.274). The overall conclusion for the eastern approaches, including the Countess Road junction, was given at PR 5.7.280:-

> "The effects of this element of the Proposed Development on OUV would be neutral or slightly positive. The effects on settings, taken as a whole, would be moderately adverse. Overall, a small degree of harm would arise."

100. It is therefore plain that the Panel's conclusion under the third main issue that "substantial harm" would be caused related solely to the western cutting and portals and to the Longbarrow junction. This is borne out by the Panel's overall conclusion at PR 5.7.297 read in context:-

> "The ExA concludes overall on this issue that substantial harm would arise with regard to the effects of the Proposed Development on spatial relations, visual relations and settings. This is despite the assessment of more moderate effects with regard to the eastern approaches and settings of assets beyond the main three elements considered."

101. The Panel addressed the fifth main issue at PR 5.7.306 to 5.7.326. First, it found that the proposal would harm attributes (1) to (3) and (5) to (7) of the OUV (PR 5.7.306 to PR 5.7.313). Under the third main issue the Panel had found that the western cutting and Longbarrow junction would only harm attributes (3), (5) and (6) (see [97-98] above). So it is plain that the judgment here was based upon the Panel's assessment of the scheme as a whole, and was not driven simply by the effects of the works in the western section. For example, PR 5.7.308 referred to the tunnel and the potentially serious loss of assets through excavation works and PR 5.7.313 referred to the profound and irreversible aesthetic and spiritual damage that would be caused, even after allowing for the removal of the existing A303. By contrast, IP1's HIA had claimed a large or very large beneficial effect for attributes (1) and (4), slight beneficial effects for attributes (5), (6) and (7) and only slight adverse effects for attributes (2) and (3).

102. The Panel then concluded that the scheme would substantially and permanently harm the integrity of the WHS, pointing to the impacts of the Longbarrow junction and the western cutting (PR 5.7.315 to PR 5.7.316). The Panel reached the view that the development would seriously harm the authenticity of the WHS (PR 5.7.317 to PR 5.7.320).

103. The Panel's overall conclusion on the fifth main issue was that the benefits *to the OUV* resulting from the scheme were outweighed by the harm caused and so "the overall effect on the WHS OUV would be significantly adverse" (PR 5.7.321). Because of this impact, the proposal did not accord with Core Policies 58 and 59 of the Wiltshire Core Strategy nor with Policy 1d of the WHS Management Plan (PR 5.7.324 to PR 5.7.325). It is important to note the Panel's overall conclusion at PR 5.7.326:-

> "The ExA concludes that the effects of the Proposed Development on WHS OUV and the historic environment as a whole would be significantly adverse. *Irreversible harm would occur, affecting the criteria for which the Stonehenge, Avebury and Associated World Heritage Site was inscribed on the World Heritage List*." (emphasis added)

As IP2 has explained (paragraph 42 of skeleton), the assessment in an HIA of impact on a WHS is not expressed using NPSNN terminology of "substantial" or "less than substantial harm".

104. At PR 5.7.327 to PR 5.7.332 the Panel summarised its conclusions on the five main heritage issues. It said that it regarded the views of ICOMOS and the WHC as important, but not of such weight as to be determinative in themselves (PR 5.7.331). The Panel then summarised its view, in terms of paragraph 5.133 of the NPSNN, that the effect of the scheme on the OUV of the WHS and on "the significance of heritage assets through development within their settings," taken as whole, would lead to "substantial harm" for the purposes of the "fork in the road" decision (PR 5.7.333 and see also PR 7.2.33). However, the Panel left the application of that policy test to its overall conclusions later on in the report.

105. In the light of a submission in relation to ground 2 made by Mr James Strachan QC (who together with Ms Rose Grogan appeared on behalf of the defendant), it is necessary to summarise how the Panel dealt separately with landscape and visual impacts in section 5.12 of its report. They did so from a general planning perspective. Paragraph 5.12.1 explains:

> "The integrity of the cultural heritage landscape was examined in a previous section of the Report. This section covers the potential impacts of the Proposed Development on existing landscape features and landscape and townscape character, together with potential impacts on visual receptors, including residents, visitors, and users of [public rights of way]"

As is common for a general assessment of this kind, the method used by IP1 was based on the Guidelines for Landscape and Visual Impact Assessment (3rd Edition) published by the Landscape Institute and the Institute of Environmental Management and Assessment (PR 5.12.14).

106. The Panel dealt with the landscape and visual impacts of the western cutting and Longbarrow junction once completed at PR 5.12.112 to 5.12.119. The assessment in this part of the report focused on the effects of the proposal on landscape character and visual amenity, and not on cultural heritage which had already been dealt with in section 5.7 of the report. The overall impact of this part of the scheme was described as being "significantly harmful". These paragraphs formed but a small part of the assessment made by the Panel of each part of the scheme in paragraphs 5.12.79 to 5.12.147. The assessment took into account broader planning considerations including effects on tranquillity, connectivity, light pollution and the night sky.

107. The Panel set out its overall conclusions on the impact of the whole scheme on landscape and visual amenity at PR 5.12.148 to 5.12.152. They concluded that it "would

cause considerable harm in the ways identified, and therefore it conflicts with the aims of the NPSNN".

108. At PR 5.17.121 to 5.17.128 the Panel set out its overall conclusions on traffic and transport which, in summary were:-

> (i) Public transport would be incapable of delivering a decisive shift from private car transport for the majority of trips in the corridor;
>
> (ii) The development would contribute to meeting the government's objective of a high quality route between the southeast and the southwest, meeting also the future needs of traffic;
>
> (iii) Journey times would be reduced, with the benefits being greater in the summer months and other times of high demand;
>
> (iv) The road would be safer helping to reduce collisions and casualties;
>
> (v) There would be a significant reduction in traffic through rural settlements helping to relieve traffic and related environmental issues;
>
> (vi) Transportation costs for users and businesses would be reduced;
>
> (vii) The scheme would help to enable growth in jobs and housing.

109. In section 7.2 of its report the Panel summarised its findings on the matters for and against the proposal which would be taken into account in the overall balance. As part of its conclusions on cultural heritage issues the Panel said at paragraphs 7.2.32 to 7.2.33:-

> "7.2.32. The ExA recognises that the Proposed Development would benefit the OUV in certain valuable respects. However, it considers that the effects of the Proposed Development would substantially and permanently harm the integrity of the WHS. In addition, it would seriously harm the authenticity of the WHS. The ExA finds that permanent, irreversible harm, critical to the OUV would occur, affecting not only our own, but future generations. The fundamental nature of that harm would be such that it would not be offset by the benefits to the OUV. The overall effect on the WHS OUV would be significantly adverse. The Proposed Development would not therefore accord with Core Policies 58 and 59 of the Wiltshire Core Strategy or Policy 1d of the WHS Management Plan.

> 7.2.33. Assessed in accordance with the NPSNN, the effect of the Proposed Development on the OUV of the WHS, and the significance of heritage assets through development within their settings, taken as a whole, would lead to substantial harm. This harmful impact on the significance of the WHS designated heritage asset shall be weighed against the public benefits in the ExA's overall conclusions."

110. It is important to note the careful distinction drawn by the Panel between these two paragraphs. PR 7.2.33 expressly made the "fork in the road" decision applying paragraph 5.133 of the NPSNN. PR 7.2.32 dealt separately with the Panel's conclusion about the effect on the OUV of the WHS. In that paragraph the Panel reiterated that the integrity of the WHS would be permanently and substantially harmed and its authenticity would be seriously harmed and that the benefits of the proposal to the OUV would not outweigh the harm caused. The Panel weighed the benefits of the proposal to the OUV for the specific purpose of deciding what the net heritage effect would be on the WHS as a designated asset itself, just as they had previously done in PR 5.7.321 (see [103] above). This should not be confused with the separate exercise carried out under paragraph 5.133 or paragraph 5.134 of the NPSNN.

111. The Panel considered landscape and visual impacts from a general planning perspective separately at PR 7.2.53 to 7.2.55.

112. At PR 7.3.1 to 7.3.43 of its report the Panel considered whether the proposed scheme would result in a breach of the Convention and thus engage s.104(4) of PA 2008, so as to displace the requirement in s.104(3) to decide the application for the DCO in accordance with the NPSNN. The argument during the Examination centred on articles 4 and 5 and is the subject of ground 4 in this challenge. Certain parties contended at the Examination that "any harm" to a WHS could breach those provisions. Others, including IP1 and IP2, argued that if a scheme complies with the policy tests in paras.5.132 to 5.134 of the NPSNN there would be no breach of the Convention. The Panel followed the latter approach (PR 7.3.40 to 7.3.43).

113. At PR 7.3.65 the Panel concluded that the ES was fully compliant with the EIA Regulations 2017. The SST accepted that conclusion at DL 67. There is no challenge to that part of the decision. But, by definition, it was impossible for the Panel to deal with the separate issue of whether the SST subsequently complied with regulation 21(1) of the EIA Regulations 2017 at the decision-making stage.

114. The Panel struck the overall balance in section 7.5 of its report. The Panel first set out its views on the benefits of the proposal (PR 7.5.5 to PR 7.5.9). It then did the same for the scheme's adverse impacts (PR 7.5.10 to 7.5.17).

115. The Panel regarded a number of factors as having limited or very limited weight, that is agriculture, the loss of a view of the Stones for people passing on the A303 (moderate weight), impact on users of byways open to all traffic, and impacts on businesses and individuals (PR 7.5.13 to 7.5.17).

116. The Panel gave substantial or considerable weight to only two sets of adverse impact (PR 7.5.11 to 7.5.12):-

(1) Substantial weight for the effects of the proposal on the WHS OUV and on the significance of heritage assets through development within their settings (drawn from section 5.7 of the report); and

(2) Considerable weight to the considerable harm to both landscape character and visual amenity (drawn from section 5.12 of the report).

117. On impact to the cultural heritage the Panel said at PR 7.5.11:-

> "The ExA considers that the effects of the Proposed Development would substantially and permanently harm the *integrity* of the WHS, now and in the future. In addition, it would seriously harm the *authenticity* of the WHS. The overall effect on the WHS OUV would be *significantly adverse*. The effect of the Proposed Development on the OUV of the WHS, and the significance of heritage assets through development within their settings, taken as a whole, would lead to *substantial harm*. The Proposed Development would not therefore be in accordance with Core Policies 58 and 59 of the Wiltshire Core Strategy or Policy 1d of the WHS Management Plan. This is a factor to which substantial weight can be attributed." (emphasis added)

This reflects the approach taken by the Panel in its conclusions in 7.2.32 to 7.2.33 (see [109-110] above).

118. On impact to landscape and visual impact the Panel said at PR7.5.12:-

> "In addition, there would be considerable harm to both landscape character and visual amenity, notwithstanding the mitigation proposed. There would therefore be conflict with the Wiltshire Core Strategy, Core Policy 51. The harms to landscape character and visual amenity are factors to which considerable weight can be attributed."

119. The Panel's striking of the overall planning balance was set out in PR 7.5.19 to 7.5.22:-

> "7.5.19. Since the ExA has identified that there would be substantial harm to the WHS, paragraph 5.131 of the NPSNN applies to the determination of the application. This requires the SoS to give great weight to the conservation of a designated heritage asset. Furthermore, substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, should be wholly exceptional.
>
> 7.5.20. In addition, paragraph 5.133 of the NPSNN provides that where the proposed development would lead to substantial harm to the significance of a designated heritage asset, the SoS should refuse consent unless it can be demonstrated that the substantial

> harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm.
>
> 7.5.21. The ExA disagrees with the Applicant as to the extent of the public benefits that would be delivered. In totality, it does not consider that substantial public benefit would result from the Proposed Development. In reaching that view, the ExA has had regard to all potential benefits including any long-term or wider benefits. In any event, those public benefits which have been identified, even if they could be regarded as substantial, would not outweigh the substantial harm to the designated heritage asset. In the light of NPSNN, paragraph 5.133, the substantial harm that would result to the WHS cannot therefore be justified.
>
> 7.5.22. In applying the NPSNN, paragraph 4.3, the ExA concludes that the totality of the adverse impacts of the Proposed Development would strongly outweigh its overall benefits. S104(7) PA 2008 applies and the NPSNN presumption in favour of the grant of development consent cannot therefore be sustained."

120. Thus, in PR 7.5.19 to 7.5.21 the Panel concluded that the proposal failed to meet the test in paragraph 5.133 of the NPSNN simply on the basis that the benefits of the scheme, even if assumed to be substantial, did not outweigh its harm. They did not go any further and apply the necessity test. It is to be noted that in striking the balance required by paragraph 5.133 of the NPSNN the Panel did not, of course, put into the disbenefits side of the balance any harm other than harm to cultural heritage. For example, harm to landscape and visual amenity was rightly not taken into account until the separate *overall* balance was struck in PR 7.5.22.

121. In Section 10 of its report the Panel summarised its overall findings and conclusions. In PR 10.2.6 the Panel summarised its separate conclusions on impacts to cultural heritage and to landscape and visual amenity. In PR 10.2.10 to 10.2.12 it repeated the separate balancing exercises carried out under paragraph 5.133 of the NPSNN and under paragraph 4.3 of the NPSNN and s.104 of the PA 2008. The Panel recommended that the SST should not make an order granting development consent for the application. On the other hand if the SST were to disagree and to grant a DCO, the Panel recommended that he should seek clarification on a number of additional points, mainly relating to the OEMP and DAMS as set out in Appendix E to the report.

The Secretary of State's decision letter

The process leading to the decision letter

122. The process has been described by Mr David Buttery, the senior official responsible for the handling of the application in the department.

123. On 27 March 2020 officials submitted a briefing note to the SST and the relevant Minister responsible for determining the application for a DCO. Officials said that there were two options. First, the SST could accept the Panel's recommendation and refuse the application for a DCO. Second, officials could explore whether there was evidence

to support the case for rejecting the recommendation and granting a DCO, on the basis, for example, that the development would result in less than substantial harm to the heritage assets. Officials drew attention to the Panel's statement that its views on cultural heritage, landscape and visual impacts were matters of judgment and were not shared by all consultees. Consequently, it might be possible to take a different view on the weight to be attached to the benefits and disbenefits of the scheme if there was sufficient justification to do so. Officials said that at that stage they had not yet identified sufficient evidence to justify an approval. In that context, they said that they would assess in detail the evidence provided by bodies such as IP2 to see whether it contained sufficient evidence to conclude that less than substantial harm would be caused. They also advised that if this second option were to be chosen, a consultation letter should be sent on the points raised in Appendix E to the Panel's report (see [119] above).

124. The SST and the Minister chose the second option. The consultation letter was sent on 4 May 2020.

125. On 6 July 2020 officials submitted a further memorandum to the Ministers recommending that a further consultation be carried out on a recent archaeological find at the WHS. Ministers agreed and a consultation letter was sent on 16 July 2020. A third and final consultation letter dated 20 August 2020 was sent allowing representations on the responses which had been received by the DfT.

126. On 28 October 2020 officials provided a further briefing note to the SST and the Minister advising that they considered that there was sufficient evidence to justify a decision that a DCO be granted and attaching a draft decision letter to that effect.

127. On 5 November 2020 the Ministers responded that they approved the grant of a DCO. The decision letter was issued on 12 November 2020.

128. I note that at paragraph 78 of its skeleton the claimant said that none of the consultation responses provided any material which could have supported the defendant's decision to reject the Panel's recommendation and to grant the DCO. This is one of several points that were not pursued, but for the record I note that it is not strictly correct. The responses to the consultation letter dated 4 May 2020 provided clarification on the issues set out in Appendix E to the Panel's report, which arose from its second main heritage issue, to do with the mitigation strategy, and were relied upon by the SST. He accepted the views of IP2 on the important subject of "artefact sampling" and concluded that the updated OEMP and DAMS submitted on 18 May 2020 "would help minimise harm to the WHS" (DL 39, 48, 50 and 80).

The decision letter

129. DL 10 explained the approach taken in the decision letter to the Panel's report:-

> "Where not otherwise stated, the Secretary of State can be taken to agree with the ExA's findings, conclusions and recommendations as set out in the ExA's Report and the reasons given for the Secretary of State's decision are those given by the ExA in support of the conclusions and recommendations."

130. At DL 12 to DL 22 the SST addressed the need for the scheme and the benefits it would bring, either in isolation or in conjunction with other improvements to the A303 corridor. The SST said that he was satisfied that there was a clear need case for the proposed development and that the benefits weighed significantly in its favour.

131. Turning to the adverse impacts of the scheme, the SST agreed with the Panel's views on issues relating to agriculture, views from the existing A303, public rights of way and harm to businesses and individuals (DL 23-24 and 57-60). He also agreed with the Panel that climate change was not a matter weighing in the balance against the proposal (DL 61) and that the matters listed in DL 63 were of neutral weight. He agreed with the Panel's assessment that granting consent by applying the heritage policies in the NPSNN would not involve a breach of the World Heritage Convention and would not engage s.104(4) (see DL 64-66).

132. The two issues on which the SST disagreed with the Panel were (a) landscape and visual impact and (b) cultural heritage impact (DL 25 to 56).

133. In relation to landscape and visual effects the SST noted the identification of various benefits and disbenefits by the Panel (DL 53) and adverse impacts by some interested parties (DL 54). He noted the views of Wiltshire Council on the permanent beneficial effects of the scheme for landscape and visual amenity and that overall it would deliver "beneficial effects through the reconnection of the landscape within the WHS and avoiding the severance of communities" (DL 54.) He then referred to the positive effects of the proposal identified by IP2 (significant reduction in sight and sound of traffic benefiting the experience of the Stonehenge monument and wider access to the landscape), English Heritage Trust and National Trust (DL 55). Drawing on that material, the SST considered that the design of the scheme accorded with principles in the NPSNN and that "the beneficial impacts throughout most of the WHS outweigh the harm caused at specific locations." Disagreeing with the Panel's judgment, the SST considered the landscape and visual impacts to be of neutral weight in the overall planning balance (DL 56). It is plain that the SST's treatment of this subject, like that of the Panel, did not address the landscape setting of monuments, or the historic landscape, which had so influenced the Panel when dealing with the impact on cultural heritage.

134. DL 25 to DL 43 and DL 50 dealing with heritage issues are annexed to this judgment in Appendix 2.

135. The SST began his consideration of heritage issues by referring to the Panel's assessment together with the differing views of a number of different parties at the Examination (DL 25).

136. At DL 26 the SST recognised the importance of the Panel's conclusion that the proposal would cause "substantial harm" to the OUV of WHS, how that would lead to the application of the test in paragraph 5.133 of the NPSNN and that substantial harm to a WHS should be "wholly exceptional."

137. The structure of the relevant part of the SST's reasoning is as follows:-

(i) In DL 28 the SST summarised the views of the Panel on its fifth main issue, namely the effects of the scheme on

the OUV of the WHS. There would be "permanent irreversible harm, critical to the OUV" affecting not only present but future generations. The benefits of the scheme to the OUV would be incapable of offsetting this harm and the overall effect would be "significantly adverse";

(ii) In DL 29 the Secretary of State summarised the views of the Panel on the first and second main issues;

(iii) The SST then referred at DL 30 to the third main issue, effects on spatial relations, visual relations and settings. He took into account the Panel's judgment that the proposal would cause substantial harm, and their recognition that that view differed from IP2 (PR 5.7.329). He identified the great weight placed by the Panel on the effects of the spatial division of the western cutting in combination with the Longbarrow junction, on the physical connectivity between monuments and the significance they derive from their settings (PR 5.7.330);

(iv) At DL 32 the SST summarised the Panel's conclusion on the fourth main issue;

(v) At DL 33 the SST summarised the Panel's overall conclusion (in PR 5.7.333) applying the NSPNN, that is the effects of the scheme on the OUV of the WHS *and* on "the significance of heritage assets through development within their settings". The Panel's judgment, drawing on what they had already concluded under the third main issue (see DL 30), was that taken as a whole there would be "substantial harm";

(vi) The SST then relied in DL 33 upon the Panel's acceptance that this was a matter of judgment upon which differing and informed opinions and evidence had been given to the Examination;

(vii) Still in DL 33, the SST drew upon the views of IP1, IP2, Wiltshire Council, the National Trust, English Heritage Trust and DCMS placing greater weight on the benefits of the scheme to the WHS from the removal of the existing A303 compared to any harmful effects of the scheme elsewhere in the WHS. Those bodies did not agree that the level of harm would be substantial. Some said that there would or could be scope for a net benefit overall to the WHS (see e.g. the cross-references to PR 5.7.70, 5.7.72 and 5.7.83);

(viii) In DL 34 the SST referred to the third main issue again. He preferred the view of IP2 on the effect of the scheme

> on spatial and visual relations and settings, judging that it would be less than substantial rather than substantial;
>
> (ix) The SST then drew upon the views of a number of parties at the Examination who, to varying degrees, were supportive of the proposal: IP2, National Trust, English Heritage Trust and Wiltshire Council (DL 35 to DL 42);
>
> (x) In DL 43 the SST said that he had carefully considered the Panel's concerns and those of other interested parties, including ICOMOS-UK, the claimant, the COA and the CBA in relation to both the effects of the proposal on the OUV of the WHS and also the cultural heritage and the historic environment of the wider area. He took into account, in particular, the concerns expressed by some interested parties and the Panel regarding the adverse impact from the western cutting and portal, the Longbarrow junction and, to a lesser extent, the eastern approach and portal. He accepted that there would be adverse impacts from those parts of the development. But the SST concluded on balance, taking into account the views of IP2 and Wiltshire Council, that any harm to the WHS as a whole would be less than substantial.

138. The judgments expressed at DL 34 and DL 43 involved the SST taking the "fork in the road" decision with the consequence that paragraph 5.134 of the NPSNN applied, rather than, as the Panel had concluded, paragraph 5.133.

139. In DL 50 the SST stated that he had placed great importance on the views of IP2. He agreed with IP2 that the harm caused would not be substantial and accepted its view that the proposed approach to artefact sampling was acceptable, disagreeing with the judgment of the Panel on those matters. It is plain from DL 34, DL 43, DL 50 and DL 80 that the SST understood IP2 to have said that there would be "less than substantial" harm and he agreed with that view. It follows that the SST did not agree with those interested parties who had gone further by suggesting that the scheme would result in a net *benefit* to the OUV of the WHS. Accordingly, the SST did not depart from the Panel's view that the benefits of the scheme to the OUV of the WHS did not outweigh the harm that would be caused to OUV attributes, the integrity and the authenticity of the WHS (see [101 to 103] above).

140. In DL 80-87 the SST summarised his overall conclusions on the application for a DCO. He dealt with heritage issues and visual and landscape impacts at DL 80-81:-

> " 80. For the reasons above, the Secretary of State is satisfied that there is a clear need for the Development and considers that there are a number of benefits that weigh significantly in favour of the Development (paragraphs 12-22). He considers that the harm that would arise to agriculture should be given limited weight in the overall planning balance (paragraphs 23-24). In respect of cultural heritage and the historic environment, the Secretary of State recognises that, in accordance with the

> NPSNN, he must give great weight to the conservation of a designated heritage asset in considering the planning balance and that substantial harm to or loss of designated assets of the highest importance, including WHSs, should be wholly exceptional. He accepts there will be harm as a result of the Development in relation to cultural heritage and the historic environment and that this should carry great weight. Whilst also recognising the counter arguments put forward by some Interested Parties both during and since the examination on this important matter, on balance the Secretary of State accepts the advice from his statutory advisor, Historic England, and is satisfied that the harm to heritage assets, including the OUV, is less than substantial and that the mitigation measures in the DCO, OEMP and DAMS will minimise the harm to the WHS (paragraphs 25-51).
>
> 81. The Secretary of State accepts there will be adverse and beneficial visual and landscape impacts resulting from the Development and recognises that the extent of landscape and visual effects is also a matter of planning judgment. He is satisfied the Development has been designed to accord with the NPSNN and that reasonable mitigation has been included to minimise harm to the landscape. He disagrees that the level of harm on landscape impacts conflicts with the aims of the NPSNN. Whilst he recognises the adverse harm caused, he considers that the beneficial impacts throughout most of the WHS outweigh the harm caused at specific locations and therefore considers that there is no conflict with the aims of the NPSNN. For these reasons, he considers landscape and visual effects to be of neutral weight in the overall planning balance (paragraphs 52-56)."

141. In DL 87 the SST concluded that the need case for the development together with the other identified benefits outweighed any harm.

142. One potential issue was whether the SST's disagreement with the Panel that there would be substantial harm to heritage assets meant that he was also disagreeing with its specific findings on the impacts of the scheme upon which that conclusion had been based. Mr Strachan QC put it neatly in his oral submissions: the SST did not disagree with the Panel's findings on specific impacts on heritage assets but he did disagree with the Panel's categorisation of those impacts as involving substantial harm. I accept that submission.

143. In my judgment there is nothing in the decision letter to indicate that the SST dissented from any of the Panel's specific findings on impact. The Panel's view that there would be substantial harm to designated assets related only to the effects of the western cutting and portals together with the Longbarrow junction. The SST's decision letter simply decided that that level of harm would be lower without expressing any disagreement or doubts about the more detailed assessments made by the Panel (see eg. PR 5.7.229 to 5.7.330 and DL 34, 43 and 50). It has to be borne in mind that the SST did not have the ES or HIA and he did not have any detailed briefing from officials about impacts on individual assets or groupings of assets. The Panel's report of IP2's views did not

provide that information because IP2 had stated that they were not setting out for the Examination an assessment of that nature, albeit that they disagreed with IP1's appraisal of some impacts (which were not identified). Indeed, if it had been submitted by the defendant, IP1 or IP2 that the decision letter should be read as if the SST had disagreed with the Panel's specific findings, and that submission had been arguable, I would have decided that the reasons given in the letter on such an important matter were legally inadequate and quashed the decision on that ground.

144. For similar reasons, I do not consider that the SST disagreed with the Panel on its conclusions that the proposal would harm attributes (1) to (3) and (5) to (7) of the OUV, as well as the integrity and authenticity of the WHS, or the specific findings on impact from which the Panel drew those conclusions. Similarly, he did not disagree with its view that benefits to the OUV of the WHS would not outweigh harm to OUV attributes, authenticity and integrity of the WHS. There is simply no reasoning in the decision letter to indicate that the SST took that course. On an issue of such importance, both nationally and internationally, the SST would have been legally obliged to state clearly that those were his conclusions. As in paragraph [143] above, if it had been submitted that the decision letter should be read as if the SST had rejected those specific findings, and that submission had been arguable, I would have decided that the reasoning was legally inadequate. The SST simply dealt with the question posed by the NPSNN of "substantial" or "less than substantial" harm which, as both he and the Panel made clear, was a judgment bringing together the overall effect of the proposal on designated assets as well as the WHS (see e.g. PR 5.7.333, PR 7.2.33 and DL 33 to 34 and 50).

Ground 1

145. The claimant raises 4 issues under ground 1 which it is convenient to take in the following order:-

(i) The SST failed to apply paragraph 5.124 of the NPSNN (see [43] above) to 11 non-designated heritage assets;

(ii) The SST failed to consider the effect of the proposal on 14 scheduled ancient monuments (i.e. designated heritage assets);

(iii) The SST failed to consider the effect of the proposal on the setting of the heritage assets, as opposed to its effect on the OUV of the WHS as a whole;

(iv) The SST's judgment that the proposal would cause less than substantial harm improperly involved the application of a "blanket discount" to the harm caused to individual heritage assets.

146. Underlying much of the claimant's case under ground 1 was the proposition that a decision-maker is obliged to consider in respect of *each* heritage asset its significance, the impact of the proposal and the weight to be given to that impact (see e.g. paras. 93 to 121 of the claimant's skeleton). The claimant relies upon regulation 3 of the 2010 Regulations (see [27] above), paragraphs 5.128 to 5.133 of the NPSNN (see [41] to [43] above) and the decision of the Court of Appeal in *City and Country Bramshill Limited*

v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 320, in particular the passage in the judgment of Lindblom LJ where he stated at [79] that in the overall balancing exercise:-

> "….. every element of harm and benefit must be given due weight by the decision-maker as material considerations…."

147. However, the court also added that the decision-maker has to adopt "a sensible approach" ([80]). The legislation on heritage assets does not prescribe any single, correct approach to the balancing of harm to those assets against any likely benefits of a proposal or other material considerations weighing in favour of the grant of consent ([72]). The same applies to policies in the NPSNN subject, of course, to applying any specific policy test which is relevant. Requirements in the NPSNN that "great weight" be given to the conservation of an asset and "the more important the asset, the greater the weight should be" are matters left to the planning judgment of the decision-maker to resolve ([73]). The same applies to the application of the tests in paragraphs 195-6 of the NPPF and paragraphs 5.133-5.134 of the NPSNN. The policies do not direct the decision-maker to adopt any specific approach as to *how* harm should be assessed or what should be taken into account or excluded in that exercise. "There is no one approach." (see ([74]).

148. In the present case, the ES upon which the planning assessments by the Panel and ultimately the SST were based, had to address a large number of heritage assets over a substantial area. The assessment for some individual assets was expressed separately for each one. But in addition a number of assets were collected together in groupings, an approach endorsed by the WHC, ICOMOS and IP2 (see [71] above). The Panel made no criticism of that approach in its report. Indeed, it adopted it at various points in its reasoning, and the same is true of the decision letter. The presentation of an assessment by the use of groupings does not mean that assets have not been individually assessed. Instead, the technique enables such assessments to be collected together and expressed in relation to an appropriate grouping. Mr. David Wolfe QC, who together with Ms. Victoria Hutton appeared on behalf of the claimant, confirmed that the claimant makes no criticism of this approach.

(i) The 11 non-designated heritage assets

149. The claimant accepts that an assessment was made of the 11 non-designated heritage assets in the western section of the scheme. They are listed in table 6.11 of chapter 6 of the ES. They are not located in the WHS. Some of the assets would be lost because of the scheme. But others would not. For example, it was said that one asset might suffer damage from compression by overlaying of material. Another could not be found when a survey was carried out, or had ceased to exist because of plough-damage.

150. The point taken by the claimant is that the Panel and the SST failed to apply paragraph 5.124 of the NPSNN by considering whether these 11 assets should be treated as having equivalent significance to scheduled ancient monuments, so that policies such as paragraphs 5.133 to 5.134 of the NPSNN might be applied.

151. With respect, there is nothing in this point. Mr. James Strachan QC, supported by Mr. Reuben Taylor QC for IP1 and Mr. Richard Harwood QC for IP2, pointed to the test which has to be satisfied for paragraph 5.124 to apply. A non-designated asset must be

"demonstrably of equivalent significance to Scheduled Monuments." Accordingly, such a monument must be considered to be of national importance (s. 1(3) of the Ancient Monuments and Archaeological Areas Act 1979). Decisions on national importance are guided by Principles of Selection laid down by the Secretary of State for Digital, Culture, Media and Sport. IP2 has published a number of scheduling selection guides on eligibility under s.1(3).

152. Table 6.1 of the ES stated that paragraph 5.124 of the NPSNN had been applied in the work carried out and cross-referred to table 6.2. The latter set out the criteria applied in the ES for determining the value of a heritage asset. A non-designated asset contributing to *regional* research objectives was assessed as having a "medium" value. A non-designated asset of comparable quality to a scheduled monument, that is one of *national* importance, was assessed as having a "high" value. None of the non-designated assets in Table 6.11 were given a high value. All were treated as having a medium value. They were therefore treated by IP1 as not falling within para. 5.124 of the NPSNN. Appendix 6.3 to the ES gave detailed references to the source material, including surveys, relied upon for this evaluation. I therefore accept the defendant's submission that this exercise was carried out transparently and in such a way that any interested party who wished to disagree, by demonstrating that any asset should be treated as equivalent to a scheduled monument, could do so.

153. The short point is that no objecting party attempted to carry out any such exercise. Accordingly, this was not an issue in the Examination, let alone a "principal important controversial issue", which the Panel was required to address in its report to the SST, or which had to be addressed in the decision letter (*South Bucks District Council v Secretary of State* [2004] 1 WLR 1953 at [36]). I should also add that the Panel's report refers to paragraph 5.124 of the NPSNN and shows that it was applied to other assets, where judged appropriate (see PR 5.7.28 and 5.7.49). The Panel approved of the approach taken in the ES, save for where it explicitly identified any disagreement (see [90] above). It did not criticise the handling of this part of the NPSNN.

154. The claimant relied upon some very brief passages in representations made to the Examination about non-designated heritage assets. These passages were of a generalised nature. They did not pick out any item from Table 6.11 of the ES to attempt to demonstrate that such a feature is of national importance, applying relevant criteria and drawing upon any source material.

155. The criticism made under ground 1(i) must be rejected.

(ii) *Failure to consider 14 scheduled ancient monuments*

156. Originally the claimant suggested in its "First Reply" that the impact on 15 scheduled monuments had not been assessed by the Panel in its report and likewise had not been assessed by the SST in his decision letter. During oral argument the number of assets was said to be 14. It was submitted that the effect of the proposal on the *setting* of these assets had not been addressed. The HIA had simply considered the effect on the OUV of the WHS. Ms. Hutton told the court that these assets are located in the vicinity of the proposed Longbarrow Junction.

157. However, as Mr. Strachan QC pointed out, the 14 designated assets were also dealt with in the "Setting Assessment", Appendix 6.9 to the ES. There the effect on the settings of

each of the assets was addressed. The defendant provided a detailed schedule showing where each asset was considered in the documentation. This has not been disputed by the claimant. The ES assessed the effects of the scheme on the settings as ranging from neutral, through slight beneficial to moderate beneficial. In no case did the ES identify any substantial harm.

158. Here again, the claimant has relied upon a few brief passages from representations made in the Examination. These passages do not contain anything like the level of detail or referencing contained in the ES or HIA, although it would appear that the document would have been prepared by expert archaeologists. The claimant has not shown that they gave rise to a principal important controversial issue which has not been addressed by the Panel in its report, for example, in its criticisms of the Longbarrow junction and its continuation of the western cutting.

159. Under its third main issue the Panel expressed its concern about the adverse impact of the western cutting and portals on the Wilsford/Normanton dry valley and the relationship between monuments on either side (see PR 5.7.227 and 5.7.229) which formed part of its finding of "substantial harm". In relation to the proposed Longbarrow junction, the Panel noted its effect on *inter alia* the Winterbourne Stoke Downs barrows, two individual scheduled monuments on Winterbourne Stoke Down and the Diamond Group (PR 5.7.239). The SST agreed with the Panel's report on these matters (see DL 10).

160. Accordingly, the criticisms made under ground 1(ii) must be rejected.

(iii) Failure to consider effect on the settings of heritage assets

161. It is plain from the review carried out above that the ES and HIA considered the effects of the scheme on both the OUV of the WHS and on the settings of heritage assets. It is also plain from its report that the Panel addressed under its third and fifth main issues the effect of the proposal on spatial relations, visual relations and settings in relation to the WHS and also heritage assets ([88] and [96-100] above). It then went on to consider effects on the OUV of the WHS and the historic environment as a whole.

162. However, the claimant submits that in his decision letter the SST failed to consider the effect of the proposal on the settings of heritage assets as well as on the WHS overall. It is said that he only considered the latter issue.

163. This criticism is untenable. It comes from a misreading of the decision letter and to some extent the Panel's report. The third and fifth main issues were not treated by the Panel as being in hermetically sealed compartments. Conclusions drawn under the third main issue on the project's effects upon the settings of assets, and upon the landscape containing these assets, also influenced the Panel's reasoning on the fifth main issue. This is plain not only from the Panel's report but also the decision letter (see [137] above). Mr. Wolfe QC is incorrect to suggest that DL 34 did not refer to the third main issue and only considered the effect on the OUV as a whole. The language of DL 34 cannot be read in that way, particularly when it is considered in the context of the preceding parts of the decision letter and the Panel's report to which it responds.

164. There is equally no merit in the submission that IP2 had only addressed the impact of the proposal on the OUV of the WHS and, therefore, because DL 34 relied upon the

opinion of IP2 that paragraph must be read as addressing only the WHS and not heritage assets. DL 30 had already referred to PR 5.7.329 to 5.7.330. From those paragraphs it was clear to the SST that the Panel understood IP2 to disagree with its view on substantial harm, in the context of the third main issue, which dealt with the effect of the development on spatial and visual relations and settings of *heritage assets*.

165. The decision letter was prepared by officials for consideration by the SST following their review of the representations which had been made in the Examination by IP2 and others. DL 33 reflects that exercise. IP2's representations in May 2019 (paras. 3.9 to 3.10 and 6.3) made it plain that it had addressed scheduled monuments (and other assets), whether contributing to the OUV or not, and whether inside the WHS or not, and had considered all parts of the ES relating to cultural heritage issues as well as the HIA (see [85] above).

166. Accordingly, the criticisms made under ground 1(iii) must be rejected.

(iv) Whether the Secretary of State took into account the impacts on all heritage assets

167. This is a challenge to the SST's judgment that the harm identified by the Panel as substantial should be treated as less than substantial. It has been put in more than one way.

168. First, it is said that that reduction in the level of harm was an improper "blanket discount" because the judgment is said to have been applied to a "significant number of designated and undesignated heritage assets" and yet the impact of the scheme was not the same for all the assets affected. Mr. Wolfe QC also described the error of law here as a "composite approach," whereas, in accordance with *Bramshill* [79] and the NPSNN (paragraph 5.129), a separate assessment of the impact on each individual heritage asset was required.

169. To some extent, the argument has moved on since the claimant's pleadings and skeleton were prepared. The claimant accepts that the requirement for individual assessment can properly be addressed by an approach based on groupings (see [129] above).

170. But what appears clearly from paragraph 76 of the Statement of Common Ground, is that, by whatever means he employs, the decision-maker must ensure that he has taken into account (a) the significance of each designated heritage asset affected by the proposed development and (b) the impact of the proposal on that significance.

171. Mr Strachan QC submitted, supported by IP1 and IP2, that the SST complied with the principle in [170] above. This is because, first, the ES addressed all relevant heritage assets. Second, the Panel identified in its report those impacts where it disagreed with the assessment in IP1's ES and must be taken as having agreed with the remainder (PR 5.7.150). Third, the SST stated in DL 10 that he is to be taken as having agreed with the findings and conclusions in the Panel's report save for where the contrary is stated. It is submitted that the SST must therefore be treated as having agreed with those parts of the ES and HIA with which the Panel did not expressly disagree.

172. The defendant's argument essentially relies upon the starting point that all relevant assets were assessed in the ES (and HIA). So the question arises whether the defendant's analysis is correct, given that neither the ES nor the HIA were before the

SST at any stage. In this context, regulation 21(1) of the EIA Regulations 2017 is relevant (see [31] above). The SST was obliged to take into account the environmental information for the proposal, which included the ES and DL11 states that he did this.

173. The ES concluded that no part of the scheme would result in substantial harm to any designated heritage asset. The Panel disagreed with that view in relation to the effects of the western cutting and portals and the Longbarrow junction. Nonetheless, the Panel recognised that that was a matter of judgment on which the SST might differ and that there had been differing opinions submitted to the Examination, not least that of IP 2 (PR 7.5.26).

174. As I have said in [137] above, the SST disagreed with the Panel's judgment that "substantial harm" would be caused by those parts of the scheme. It follows that he disagreed with the conclusions in PR 5.7.236, 5.7.248, 5.7.297, 5.7.329, 5.7.333, 7.5.11, 7.5.19, 7.5.21 and 10.2.10 that that level of harm would be substantial. However, the SST did not disagree with the more specific findings of the Panel upon which its "substantial harm" conclusion was based. The effect of DL 10 is that he agreed with those findings (see [142 to 144] above).

175. The agreed principle in [170] above does not lay down a rubric as to how an assessment should be made or how reasoning should be expressed. It does not indicate that something akin to the analysis in an environmental statement is required. It is open to a decision-maker to accept the findings of an Inspector or Panel about the specific impacts that would be caused by a proposed development, or a part thereof, and then to say as a matter of judgment that those effects should be treated as less than substantial harm rather than substantial harm, particularly where that view is supported by the evidence and opinion of a specialist adviser such as IP2 in this case. It was not suggested that the judgment in the present case should be treated as irrational. That is hardly surprising given what the Panel had said at PR 5.7.26. So that part of ground 1(iv) which seeks to attack what is described as a "blanket discount" does not assist the claimant.

176. But the real issue remains whether the principle in [170] above has been satisfied in the decision letter in the light of the explanation of the decision-making process given in [171].

177. Notwithstanding regulation 21(1) of the EIA Regulations 2017 and the contents of DL11, the defendant's legal team informed the court that the ES and HIA were not before Ministers when they were considering the Panel's report and the determination of the application for development consent. It is said that "the ES and HIA were considered by officials in providing their advice and the ES and HIA formed part of the examination library accessible from the examination website". However, as is clear from the case law cited in [62] to [65] above, what was within the knowledge of officials is not to be treated on that account as having been within the Minister's knowledge, unless it was drawn to his attention in a briefing or precis.

178. That same case law suggests that in the real world a Minister cannot be expected to read every line of an environmental statement and all the environmental information generated during an examination or inquiry process. But nevertheless, an adequate precis and briefing is required. Depending on the circumstances, that requirement may be met, wholly or in part, by the report of a Panel or an Inspector (for example, where the Secretary of State agrees with the relevant parts of that report). It may also be

provided in the draft decision letter which is submitted to the decision-maker for his consideration or in any additional briefing. That would be necessary in a typical case where only one or a small number of heritage assets are impacted. The requirement *to take into account* the impact on the significance of each relevant asset still applies in an atypical case, such as the present one, where a very large number of heritage assets is involved. It will be noted, however, that although regulation 21(1) requires the decision-maker to take into account the environmental information in a case, it does not require him to give his own separate assessment in relation to each effect or asset.

179. Here, the SST did receive a precis of the ES and HIA in so far as the Panel addressed those documents in its report. But the SST did not receive a precis of, or any briefing on, the parts of those documents relating to impacts on heritage assets which the Panel accepted but did not summarise in its reports. This gap is not filled by relying upon the views of IP2 in the Examination because, understandably, they did not see it as being necessary for them to provide a precis of the work on heritage impacts in the ES and in the HIA. Mr Wolfe QC is therefore right to say that the SST did not take into account the appraisal in the ES and HIA of those additional assets, and therefore did not form any conclusion upon the impacts upon their significance, whether in agreement or disagreement.

180. In my judgment this involved a material error of law. The precise number of assets involved has not been given, but it is undoubtedly large. Mr Wolfe QC pointed to some significant matters. To take one example, IP1 assessed some of the impacts on assets and asset groupings not mentioned by the Panel as slight adverse and others as neutral or beneficial. We have no evidence as to what officials thought about those assessments. More pertinently, the decision letter drafted by officials (which was not materially different from the final document – see [67] above) was completely silent about those assessments. The draft decision letter did not say that they had been considered and were accepted, or otherwise. The court was not shown anything in the decision letter, or the briefing, which could be said to summarise such matters. In these circumstances, the SST was not given legally sufficient material to be able lawfully to carry out the "heritage" balancing exercise required by paragraph 5.134 of the NPSNN and the overall balancing exercise required by s.104 of the PA 2008. In those balancing exercises the SST was obliged to take into account the impacts on the significance of all designated heritage assets affected so that they were weighed, without, of course, having to give reasons which went through all of them one by one.

181. Accordingly, I uphold ground 1(iv) of the challenge.

Conclusion

182. For these reasons, I uphold ground 1(iv) of the challenge and reject grounds 1(i), (ii) and (iii).

Ground 2 – lack of evidence to support disagreement with the Panel

183. The claimant submits that the SST disagreed with the Panel on the substantial harm issue without there being any proper evidential basis for doing so. Mr. Wolfe QC advances this ground by reference to the SST's acceptance of the views of IP2 in DL 34, 43, 50 and 80. He submitted that IP2's representations did not provide the SST with evidence to support his disagreement with the Panel on "substantial harm" in two

respects. First, he said that HE only addressed the spatial aspect of the third main issue and did not address harm to individual assets or groups of assets. Second, he submitted that SST had misunderstood IP2's position: it had never said that the harm would be less than substantial.

184. It should be noted that although the claimant had raised other more detailed criticisms, Mr. Wolfe QC did not pursue them in oral submissions or invite the court to deal with them. No doubt he considered that ground 2 should stand or fall on the points that he chose to advance as set out above.

185. The short answer is to be found in PR 5.7.329 to 5.7.330. The Panel understood that IP2 took the view that no substantial harm would be caused to any asset and that the reasons for the difference of view between the Panel and IP2 were concerned with the effects of the western cutting and portals and the new Longbarrow junction. Those passages would have reflected what took place during the hearings in which IP2 took part, as well as its written representations. IP2 has confirmed that the Panel's report at PR 5.7.329 to 5.7.330 accurately set out its position in the Examination (para. 28 of Detailed Grounds of Defence). There is no proper basis for the court to go behind what was said by the Panel in its report on this subject. The SST was plainly entitled to rely upon that part of the report.

186. It is also apparent from PR 5.7.329 to 5.7.330 that the Panel was dealing with its overall finding of substantial harm under the third main issue. The claimant's attempt to confine the effect of those passages to effects on "spatial relations, visual relations and settings" overlooks the fact that PR 5.7.329 simply repeated the heading given for the third main issue when it was introduced in PR 5.7.129. It is plain from the section of the report devoted to the third main issue that the Panel considered both the spatial aspect and the harm to heritage assets and their setting. There is no reason to think that the shorthand they used in PR 5.7.329 was meant to suggest that IP2 had only considered the spatial aspect. This is a forensic, excessively legalistic argument of the kind which should not be advanced in the Planning Court.

187. In any event, on a fair reading of IP2's representations, it is plain that it did consider those parts of the ES and HIA which assessed impacts on individual heritage assets or groups of assets.

188. For these reasons, ground 2 must be rejected.

189. For completeness, I would add that I do not accept the submission of Mr Strachan QC that the SST's disagreement on the level of harm resulting from the western section of the scheme was supported by his conclusions in DL 52 to 56 on landscape and visual amenity impacts from a general planning perspective. Both the Panel and the SST treated those issues separately from the historic landscape matters which arose under the cultural heritage sections of their respective assessments. However, Mr Strachan's submission is not necessary for the court to reject ground 2.

Ground 3 – double-counting of heritage benefits

190. The claimant submits that the SST not only took into account the heritage benefits of the scheme as part of the overall balancing exercise required by para. 5.134 of the NPSNN, but also took those matters into account as tempering the level of heritage

disbenefit. It is said that this was impermissible double-counting because those heritage benefits were placed in both scales of the same balance.

191. But the claimant also made a further submission which is rather different. It was said that the SST relied upon heritage benefits in DL 34 and DL 43 as reducing the level of heritage harm when deciding whether less than substantial harm would be caused (ie. whether paragraph 5.133 or 5.134 of the NPSNN should be applied), and then also took those heritage benefits into account when deciding whether the balance pointed in favour or against the scheme.

192. It is necessary to be clear about how the policies in the NPSNN operate, the process which was followed in the ES and HIA, and the chain of reasoning in the decision letter.

193. Paragraphs 5.133 and 5.134 of the NPSNN lay down the criteria which determine which of the policy tests is to be applied for dealing with harm to heritage assets (the "fork in the road decision" - see [47] above). In the light of *Bramshill* at [71] it is common ground that in reaching this judgment, the decision-maker *may* take into account benefits to the heritage asset itself (referred to as an "internal balance") but he is not obliged to do so (and see [74]).

194. In *Bramshill* at [78] Lindblom LJ stated:-

> "Cases will vary. There might, for example, be benefits to the heritage asset itself exceeding any adverse effects to it, so that there would be no "harm" of the kind envisaged in paragraph 196 [of the NPPF]. There might be benefits to other heritage assets that would not prevent "harm" being sustained by the heritage asset in question but are enough to outweigh that "harm" when the balance is struck. And there might be planning benefits of a quite different kind, which have no implications for any heritage asset but are weighty enough to outbalance the harm to the heritage asset the decision-maker is dealing with."

For the purposes of the present case, two points may be drawn from that passage.

195. First, when assessing the impact of a project on a heritage asset it is permissible to combine both the beneficial and the adverse effects *on that asset*. That is not so much a balancing exercise as a realistic appraisal of what would be the net impact of the project on the asset, viewed as a whole and not partially. That approach was followed in the ES in this case. It was necessary to take into account the A303 as part of the existing baseline and to take into account the beneficial impact on an individual asset of removing that road as well as any harmful impact on that asset from the new scheme. The net outcome might be positive, neutral or negative.

196. Second, if a scheme would cause harm to one asset and benefit to another, that does not alter the judgment that the first asset will be harmed. Instead, the benefit to the other is a matter to be weighed in whichever balance falls to be applied under the NPSNN, or indeed paragraphs 195 or 196 of the NPPF. Here again we see the distinction between deciding which of the two policy tests in those paragraphs is to be applied and the carrying out of the balancing exercise itself.

197. There is a tendency to use the term "double-counting" imprecisely as if to say that it is necessarily objectionable whenever a particular factor is taken into account in a decision on a planning application more than once. That is too sweeping a proposition. Well-known planning policies contain examples where legitimately the same factor may have to be taken into account more than once. For example, in Green Belt policy some types of development are regarded as inappropriate if they would harm the openness of the Green Belt and/or conflict with the purposes of including land within it (paras. 145 and 146 of the NPPF). In those circumstances, the application of the "very special circumstances test" will also require that harm to the Green Belt to be included in the overall planning balance. There is no improper double-counting. The same factor is being assessed twice for two different and permissible purposes.

198. Paragraph 11(d) of the NPPF provides another example. If, for example the presumption in favour of granting permission is engaged (e.g. because the supply of housing land is less than 5 years) the "tilted balance" in sub-paragraph (ii) may be applicable. If so, the extent to which the proposal complies with or breaches development plan policies may be taken into account in the balance required to be struck under paragraph 11(d)(ii). But it is also necessary to take into account those polices when striking the balance required by s.38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004"). Those two balances may either be struck separately or taken together. Either way, there is no impermissible double-counting. Taking into account the same factor more than once is simply the consequence of having to apply more than one test (see *Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 104 at [62]-[67] and [2020] PTSR 993 at [110]). The same considerations may apply where paragraph 11(d)(i) falls to be applied.

199. The policies in paragraphs 5.133 to 5.134 of the NPSNN are similar in nature to the first of those examples. These paragraphs determine which of the two tests for decision-making on heritage policy are to be applied, before arriving at the overall planning balance. A beneficial impact on a heritage asset may appropriately be taken into account in determining the net level of harm which that asset would sustain and therefore which policy test is engaged, and then again in the balancing exercise required by that test when *all* public benefits are weighed against all harm to heritage assets. The same factor is taken into account at two different stages for different and permissible purposes. There is no question of improper double-counting. Ultimately, in his reply Mr. Wolfe QC accepted this analysis.

200. Accordingly, the real issue under ground 3 has come down to whether the SST, when striking the balance, put the same benefits in both scales, for and against the proposal (see [190] above).

201. The ES and HIA assessed the impacts of the proposal on individual assets and groups of assets and arrived at the conclusion that no asset would be substantially harmed. On that basis the test in paragraph 5.134 would fall to be applied. I accept the submission of the defendant and IP1 that that series of separate judgments did not involve any off-setting of net benefit to one asset against net harm to another. The claimant did not identify any material to the contrary.

202. The Panel disagreed with that assessment in relation to the impacts of two elements of the scheme, the western cutting and portals and the Longbarrow junction. They judged

that there would be substantial harm to assets or groups of assets and to the OUV of the WHS in certain locations (see e.g. PR 5.7.219, 5.7.224, 5.7.228 to 5.7.229, 5.7.231 to 5.7.232, 5.7.239, 5.7.241, 5.7.245 and 5.7.247). The Panel's judgment was based upon its assessment of the scale and design of the civil engineering works together with the mitigation proposed, and their effect upon the setting of assets and the landscape in which they feature. In reaching its judgments the Panel appropriately took into account the removal of the A303 because that in itself affects the impact on relevant assets, as well as the mitigation proposed for those elements of the scheme (see e.g. PR 5.7.236 and 5.7.248). There is no evidence that when it made its judgment on the "fork in the road" between paragraphs 5.133 and 5.134 of the NSPSNN, the Panel introduced off-setting between different assets or had regard to the broader (or generic) heritage benefits of the entire scheme (e.g. as set out in PR 5.7.29 – see [70] above). The Panel performed the overall balancing exercise separately in section 7.5.

203. In DL 34 and DL 43 the SST set out his conclusion on which of the policy tests in paragraph 5.133 or paragraph 5.134 of the NPSNN should be applied. Having decided in favour of paragraph 5.134, the SST then applied that test in DL 51. There, the SST simply weighed benefits from the overall scheme ("the public benefits") against the harm he had already identified. They included the overall or generic scheme benefits for cultural heritage identified at PR 5.7.29. The benefits in PR 5.7.29 were put into the correct scale. There is no indication that the SST put the positive effects on each *individual* asset or asset grouping attributable to the western section of the proposed scheme in both sides of the balance.

204. In DL 80 the SST drew upon his earlier conclusions in DL 34 and DL 43 that the proposal would cause less than substantial harm, but there is no suggestion in DL 80 that that judgment was tainted by improperly taking into account heritage benefits from the scheme overall rather than the way in which the contentious elements of the western section of the scheme affected relevant assets. That judgment had previously been reached in DL 34 and DL 43.

205. Ultimately, ground 3 came down to an attack on the way in which the SST reached his conclusions on less than substantial harm in DL 34 and DL 43. In my judgment, they contain no indication that the SST took into account *overall* benefits of the scheme rather than effects of the scheme on *individual* relevant assets, so that this resulted in improper double-counting either in DL 51 or in DL 80 to DL 87.

206. The claimant's submission was also advanced on the basis that the SST had relied upon the views of IP2 and that the latter had taken that broader approach. I reject that submission. In PR 5.7.229 to 5.7.330 the Panel stated that IP2 had taken the view that less than substantial harm would be caused to assets affected by the western cutting and Longbarrow junction. The Panel gave no indication that that involved a different and broader approach to the assessment of that harm, one which took into account overall or generic scheme benefits, as compared with its own approach. Instead, the Panel said that it was simply a difference of professional judgment on the evidence. The claimant's submission on this point is not supported by any of the documents shown to the court

207. The claimant sought to criticise the relationship between DL 33 and DL 34 in order to suggest that impermissible double-counting was introduced into DL 34. I disagree. Part of DL 33 addressed the Panel's conclusion on the effect of the overall scheme on the WHS. It was in that context that the SST referred to the views of IP2 and others that

greater weight should be given to the beneficial effects of removing the existing A303 from the WHS rather than the harmful effects of part of the new scheme on part of the WHS. Indeed, some contended that there would be a net benefit overall. This approach was entirely proper because, it was necessary to consider the WHS as a whole and, correctly, it involved treating the WHS as a designated heritage asset in itself. Thus the benefits relevant to that asset would necessarily relate to the scheme as a whole. That approach is entirely consistent with the second and third sentences of [78] in *Bramshill* (see [194 to 196] above).

208. But in DL 34 the SST also brought in the third main issue and did so in the context of what he had already said in DL 30. The difference between IP2 and the Panel related to the effect of the western cutting and the Longbarrow junction on heritage assets and also the OUV of the WHS. Here, there is no reason to think that the SST, relying upon the views of IP2, took into account a wider range of heritage benefits than was permissible for the purposes of deciding whether paragraph 5.133 or 5.134 of the NPSNN applied (see [206] above).

209. For these reasons, ground 3 must be rejected.

Ground 4 – whether the proposal breached the World Heritage Convention

210. The claimant contends that the SST's acceptance that the scheme would cause harm, that is less than substantial harm, to the WHS involved a breach of articles 4 and 5 of the Convention and therefore the SST erred in law in concluding that s.104(4) of PA 2008 was not engaged. It was engaged and so, it is submitted, the presumption in s.104(3) should not have been applied in the decision letter.

211. The claimant's case as set out in its skeleton (see e.g. para. 242) appeared to be that any harm, or at least any significant harm, to the WHS would, if allowed, involve a breach of articles 4 and 5 of the Convention, irrespective of whether the benefits of the scheme were judged to have greater weight. That appears to have been the case presented in the Examination and which IP1 successfully persuaded the Panel to reject. In his oral submissions Mr. Wolfe QC shifted the case significantly. He accepted that the Convention allows for a balance to be struck between harm to the WHS and benefits, but contended that only heritage benefits, in particular benefits to the WHS, its OUV and attributes, could be taken into account in that balance. Thus, he submitted, the balance required to be struck by either paragraph 5.133 or paragraph 5.134 of the NPSNN conflicts with the Convention.

212. The first issue is whether the Convention has been incorporated into UK law, or the law applicable in England and Wales, so that its construction is a matter of law directly for this court. Although the Convention had been ratified by the UK, it is common ground that it has not been incorporated into our domestic law by legislation. Instead, Mr. Wolfe QC submitted that an international treaty may be treated by the court "as for all practical purposes as incorporated into domestic law," citing Lord Steyn in *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1 at [40] et seq. However, that decision does not assist the claimant. Lord Steyn was not prepared to treat a provision in the Immigration Rules not requiring any action to be taken contrary to the Refugee Convention as incorporating that Convention into English law. The Rules were insufficient for that purpose. But because the same principle was later enacted in

primary legislation, it was that measure which was held to have been sufficient to achieve incorporation (see [41] to [42]).

213. In the present case the claimant merely points to s.104(4) of the PA 2008. But that refers to international obligations generally and not specifically to the World Heritage Convention. As Mr. Taylor QC pointed out, on the claimant's argument s.104(4) would have the effect of incorporating *any* international obligation into our domestic law, but *only* for the purposes of determining an application for a DCO. There is nothing in the language used by Parliament to indicate that it intended to achieve such a strange result.

214. Instead, all that s.104(4) does is to make a breach of an international obligation one of the grounds for not applying s.104(3). But as Mr. Wolfe QC accepted, where s.104(4) is met, that does not automatically result in the refusal of an application for a DCO. Accordingly, Mr. Wolfe QC accepted that the highest that he could put the incorporation argument is that s.104(4) treats the issue of whether a proposal would comply with the Convention as a mandatory material consideration, and not that Parliament requires a proposal to comply with the Convention as a matter of law.

215. I am not persuaded that Mr Wolfe's revised analysis provides a sufficient justification for concluding that an international obligation has been incorporated into domestic law. Mr. Wolfe QC has not shown the court any authority where that has been accepted. Indeed, if the Convention is simply being treated as a material consideration, rather than as an instrument with which a proposal must comply, the issue of whether a proposal is in conflict with the Convention is essentially a matter of judgment for the decision-maker, subject to review on the grounds of irrationality. That is especially so given the very broad, open-textured nature of the language used in articles 4 and 5. The position would not be materially different from the second authority cited by Mr. Wolfe QC, *R v Secretary of State for the Home Department ex parte Launder* [1997] 1WLR 839, where the Secretary of State took the ECHR into account and the grounds of challenge were dealt with under the law on irrationality (see pp.867E to 869B).

216. On the basis that the Convention has not been incorporated into domestic law, the relevant principles on the interpretation of that instrument were set out by Lord Brown in *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756 at [67] to [68]. The court should allow the executive a margin of appreciation on the meaning of the Convention and only interfere if the view taken is not "tenable" or is "unreasonable." This approach allows for the possibility that, so far as the domestic courts are concerned, more than one interpretation, indeed a range, may be treated as "tenable." The issue is simply whether the decision-maker has adopted an interpretation falling within that range.

217. I have no hesitation in concluding that the SST was entitled to decide that the policy approach in paragraphs 5.133 and 5.134 of the NPSNN (read together with the surrounding paragraphs) is compliant with the Convention. That is a tenable view. If I had to decide the point of construction for myself, I would still conclude that those policies are compliant with the Convention.

218. Although Articles 4 and 5 refer to matters of great importance, they are expressed in very broad terms. By article 4 each State Party has recognised that the duty of protecting and conserving a WHS belongs primarily to that State, which "will do all it can to this end, to the utmost of its own resources." Resources are, of course, finite and they are

the subject of competing social, economic and environmental needs. The Convention does not further explain the meaning and scope of the language used in article 4. This must be a matter left to individual Party States.

219. In any event, article 4 has to be read in conjunction with the slightly more specific provisions in Article 5, and not in isolation. There the obligation on each State is to endeavour "as far as possible", and "as appropriate" for that country, to comply with paragraphs (a) to (e). They include the taking of the "appropriate" legal measures necessary to protect and conserve the heritage referred to in articles 1 and 2.

220. The broad language of these Articles is compatible with a State adopting a regime whereby a balance may be drawn between the protection against harm of a WHS or its assets and other objectives and benefits and, if judged appropriate, to give preference to the latter. The Convention does not prescribe an absolute requirement of protection which can never be outweighed by other factors in a particular case. Nor does the Convention use language which would limit such other factors to heritage benefits or benefits for the WHS in question. I also note that in its Guidance on Heritage Impact Assessments for Cultural World Heritage Properties, ICOMOS accepts that a balance may be drawn between the "public benefit" of a proposed change and adverse impacts on a WHS (para. 2-1-5).

221. The Australian authorities cited (*Commonwealth of Australia v State of Tasmania* (1983) 46 ALR 625; *Australian Convention Foundation Incorporated v Minister for the Environment* [2016] FCA 1042) need to be read carefully. Those cases were concerned with circumstances in which the Convention had been incorporated into Australian law by legislation and any observations on interpretation should be understood in the context to which the decisions were addressed. Having said that, I do not see my conclusion as conflicting with any of the observations in those decisions. They do not lend any support for the interpretation which Mr. Wolfe QC said must be given to the Convention. Indeed, the observations in the High Court of Australia in the Tasmanian Dam case upon which Mr Wolfe QC principally relied, emphasise the discretion left to individual State Parties as to the steps each will take and the resources it will commit (see e.g. Brennan J at p.776).

222. For these reasons, ground 4 must be rejected.

223. Although it is not necessary for my decision on ground 4, I would add one further point. As I have noted, it is common ground that there is no material difference between paragraphs 5.133 to 5.134 of the NPSNN and paragraphs 195 to 196 of the NPPF. The antecedent policy in Planning Policy Statement 5 (PPS5) was to the same effect and contained a statement that the government considered the policies it contained to be consistent with the UK's obligations under the Convention. No legal challenge has been brought to the policies in question, for example, on the basis that they adopted an interpretation of the Convention which is incorrect *on any tenable view*. A legal challenge to the NPSNN would now be precluded by s.13(1) of the PA 2008. Under s.106(1) a representation relating to the merits of a policy set out in a NPS may be disregarded by the SST (see also *Spurrier* and *ClientEarth*).

Ground 5

224. The claimant raises three contentions under ground 5:-

(i) The SST failed to take into account any conflict with Core Policies 58 and 59 of the Wiltshire Plan and with policy 1d of the WHS Management Plan;

(ii) The SST failed to take into account the effect of his conclusion that the proposal would cause less than substantial harm to heritage assets on the business case advanced for the scheme;

(iii) The SST failed to consider alternative schemes in accordance with the World Heritage Convention and common law.

(i) Failure to take into account local policies

225. It is plain from, for example, DL11 and DL27 that the SST had regard to the Wiltshire Core Strategy and the WHS Management Plan.

226. In PR 5.7.322 to 5.7.325 of its report the Panel stated in a section devoted to its fifth main issue that in view of its conclusions on the impact of the scheme on the OUV of the WHS, the proposal would not accord with Core Policies 58 and 59 of the Core Strategy, nor with policy 1d of the WHS Management Plan. The Panel clearly thought that the language used in PR 5.7.324 was apt to cover impact upon the settings of designated heritage assets, the subject of Core Policy 58. The Panel carried that conclusion regarding conflict with those three policies through to its summary of the adverse impacts of the scheme within section 7.2 dealing with the planning balance. At PR 7.2.32 the Panel restated the conflict they perceived with the three local policies in terms of harm to the WHS and its OUV. There is no reason to think that in that paragraph the Panel excluded the broader consideration addressed in PR 7.2.33. In any event, at PR 7.5.11 the Panel restated its conclusion on breach of the three policies in terms of both harm to the OUV of the WHS and harm to "the significance of heritage assets through development within their settings." Plainly the Panel did not think these differences in wording were important for a true understanding of their reasoning on local policies.

227. In DL28 the SST stated:-

> "The ExA concludes the Development would benefit the OUV in certain valuable respects, especially relevant to the present generation. However, permanent irreversible harm, critical to the OUV would also occur, affecting not only present, but future generations. It considers the benefits to the OUV would not be capable of offsetting this harm and that the overall effect on the WHS OUV would be significantly adverse [ER 5.7.321]. The ExA considers the Development's impact on OUV does not accord with the Wiltshire Core Strategy Core Policies 59 and 58, which aim to sustain the OUV of the WHS and ensure the conservation of the historic environment [ER 5.7.322 – 5.7.324], and that the Development is also not consistent with Policy 1d of the WHS Management Plan [ER 5.7.325]. It considers this is

> a factor to which substantial weight can be attributed [ER 7.5.11]."

228. The claimant complains that this failed to address the breach of Core Policy 58 as a result of harm caused to the settings of a number of designated assets (para. 262 of skeleton). But the SST's summary in DL28 accurately and fairly reflects the language used by the Panel themselves to cover the issues raised by both Core Policies 58 and 59. The criticism is wholly untenable.

229. The second complaint is that the SST disagreed with the Panel on the level of harm that would be caused to heritage assets (i.e. from the western cutting and from the Longbarrow junction) and so cannot be taken to have accepted, in accordance with DL 10, that that lesser degree of harm still involved conflict with the three local policies. But the language used in those policies does not indicate that "less than substantial" harm could not involve any conflict therewith and the SST said nothing to the contrary. The only rational inference is that the SST accepted that there remained a conflict with those policies. The second criticism is no better than the first.

230. There is nothing in the decision letter to indicate that the conflict with local policies was disregarded by the SST. In any event, and as Mr. Strachan QC submitted, the local policies do not refer to any balancing of harm against the benefits of a proposal, as required by the NPSNN. The NPSNN was the primary policy document to be applied under the PA 2008 according to s.104(3), which may be contrasted with s.38(6) of PCPA 2004 Act (see also para. 91 of the defendant's skeleton and *Bramshill* at [87]).

231. For these reasons ground 5(i) must be rejected.

(ii) *The alleged error regarding the business case for the scheme*

232. This complaint arises from paragraph 4.5 of the NPSNN (see [40] above). An application is normally to be supported by a business case prepared in accordance with Treasury Green Book principles. It provides the basis for investment decisions and will also be important for the consideration by the Examining Authority or by the Secretary of State of the adverse impacts and benefits of a proposal. However, the NPSNN does not suggest that such a business case should put a monetary value on every factor which goes into a planning balance or a balance carried out under paragraphs 5.133 or 5.134 of the NPSNN.

233. Nonetheless, the claimant submits that the SST's decision was flawed because he did not take into account his conclusion that two elements in the western section of the scheme would result in less than substantial harm to heritage assets.

234. The point is said to arise in this way. The cost benefit analysis for the scheme placed a monetary value of £955m on the benefit of removing the existing A303 from the WHS. This was by far the greatest monetary benefit ascribed to the scheme, being approximately ¾ of its overall benefits. The costs of the scheme were said to be between £1.15bn and £1.2bn (Table 5-6 of IP1's "Case for the scheme and NPS accordance"). So without the sum attributed to the removal of the A303 the analysis would be heavily negative. That is hardly surprising. The construction of a 3.3 km tunnel, the cuttings and the junctions are expensive works.

235. The figure of £955m was arrived at by a public attitude survey which asked people to put a monetary value on their willingness to pay for the perceived benefit of removing the existing A303 and its traffic from the immediate vicinity of Stonehenge; or to put a monetary value on their willingness to accept a payment as compensation for the loss of amenity to travellers on the existing A303 through no longer being able to see Stonehenge while travelling. The survey was targeted at three groups: visitors to Stonehenge, road users and the general population (PR 5.17.94).

236. A number of criticisms were made of this approach during the Examination (see e.g. PR 5.17.96 to 5.17.99). IP1 accepted that it was unusual for cultural heritage assets to be given a monetary value in the appraisal of a transport scheme, but here the enhancement of the cultural heritage was so significant that it formed an integral part of the objectives of the scheme and it was therefore considered appropriate to make an attempt at quantification of that factor (PR 5.17.100). However, it is plain that the exercise did not attempt to monetise all positive or negative impacts upon cultural heritage or all factors going into the planning balance. IP1 submitted at the Examination that the two should not be confused (PR 5.17.112). The cost benefit analysis formed part of a value for money exercise. It was relevant, for example, that funding was in place, given that compulsory purchase powers needed to be granted as part of the DCO.

237. The National Audit Office pointed out that although IP1 had used approved methodologies to arrive at the figure of £955m, calculating benefits in that way was inherently uncertain and decision-makers were advised to treat them cautiously (PR 5.17.108).

238. The Panel took a realistic attitude to this debate (PR 5.17.117):-

> "The ExA makes no specific criticism of the manner in which the study has been undertaken, or the methodology adopted. It appears to the ExA a genuine attempt undertaken to put a value on heritage benefits as described in the survey material. However, the ExA recognises that this is hedged with uncertainty and endorses the cautious approach advocated by the NAO and the DfT itself. The ExA notes the concerns of SA and others that the visual information provided to survey participants did not fully represent the impact of the Proposed Development on the WHS and recognises that participants could not be expected to have the detailed knowledge of impacts that the Examination process has allowed. The ExA also understands that participants might, if presented with choices about what their taxes would be spent on, adjust the priority given to otherwise desirable heritage outcomes."

239. The whole of the Panel's report was before the SST. The Panel accepted that respondents to the survey could not be expected to have detailed knowledge about impacts on cultural heritage that had been discussed in the Examination. It did not suggest that this component of the economic or investment analysis should be adjusted, in some way, whether quantitatively or otherwise, according to the judgments reached on heritage impacts, for example, from the western section of the scheme.

240. The SST did not disagree with the Panel's approach. Given the nature and purpose of the cost benefit analysis, the view taken on the level of heritage benefits or disbenefits attributable to parts of the scheme was not an "obviously material consideration" which the SST was obliged to take into account as altering the business case.

241. Accordingly, ground 5(ii) must be rejected.

(iii) Alternatives to the proposed western cutting and portals

242. The focus of the claimant's oral submissions was that the defendant failed to consider the relative merits of two alternative schemes for addressing the harm resulting from the western cutting and portal, firstly, to cover approximately 800m of the cutting and secondly, to extend the bored tunnel so that the two portals are located outside the western boundary of the WHS.

243. The Panel dealt with the issue of alternatives in section 5.4 of its report, before it came to deal with impacts on the cultural heritage in section 5.7. On a fair reading of the report as a whole, there is no indication that the substantial harm it identified in section 5.7 influenced the approach it had previously taken to alternatives. The same is true of section 7.2 of the report which brought together in the planning balance the various factors which had previously been considered. Paragraph 7.2.25 summarised the Panel's overall conclusion on the treatment of alternatives in section 7.4. After dealing with biodiversity and climate change the Panel summarised its conclusions on cultural heritage issues at paragraphs 7.2.31 to 7.2.33. The reason for this would appear to be the way in which the Panel applied the NSPNN.

244. It is important to see how the Panel approached the issue of alternatives in section 5.4. They directed themselves at the outset by reference to paragraphs 4.26 and 4.27 of the NPSNN (see [41] above) (see PR 5.4 to 5.4.2). Those policies framed the Panel's conclusions at PR 5.4.56 to 5.4.75.

245. IP1's case, applying paragraph 4.26 to 4.27 of the NPSNN, was that the only consideration of alternatives relevant to the Examination were:

> (i) "to be satisfied that an options appraisal has taken place,"
>
> (ii) compliance with the EIA Regulations 2017 in relation to the main alternatives studied by the applicant and the main reasons for the applicant's decision to choose the scheme, and
>
> (iii) alternatives to the compulsory acquisition of land (PR 5.4.3 and 5.4.60).

246. At PR 5.4.56 the Panel stated that IP1 had correctly identified all legal and policy requirements relating to the assessment of alternatives. It accepted that alternatives did not have to be assessed under The Conservation of Habitats and Species Regulations 2017 (SI 2017 No 1012) ("the Habitats Regulations 2017") or the Water Framework Directive (PR 5.4.57 to 5.4.58). In relation to policy requirements, the Panel accepted that IP1 had satisfied the sequential and exception tests for flood risk and that no part of the scheme fell within a National Park or an Area of Outstanding Natural Beauty (PR 5.4.59). However the Panel did not consider any policy requirements relating to cultural heritage impacts which might make it appropriate or even necessary to reach a

conclusion on the relative merits of IP1's scheme and alternatives to it. That is all the more surprising given that a significant part of the Panel's report was devoted to the representations of interested parties about alternatives to avoid or reduce the harm to the WHS and heritage assets that would result from IP1's scheme (see PR 5.4.35 to 5.4.55).

247. The Panel summarised IP1's case on options for a longer tunnel at PR 5.4.16 to 5.4.27 and the representations of interested parties on that issue at PR 5.4.45 to 5.4.49. As a result of the concerns expressed by the WHC about the western section of the project, IP1 had studied two longer tunnel options: first, the provision of a cut and cover section to the west of the proposed bored tunnel and second, an extension of that bored tunnel to the west so that its portals would be located outside the WHS. The former would increase project costs by £264m and the latter by £578m (PR 5.4.18 to 5.4.19). In the HIA IP1 stated that the options involving 4.5km tunnels were assessed as having "significantly higher estimated scheme costs that were considered to be unaffordable and were not considered further in the assessment" (para. 7.3.12) However, in the Examination IP1 said, in addition, that it had rejected both of these options not purely on the grounds of cost but also because they would provide "minimal benefit in heritage terms" (PR 5.4.20).

248. It is important to see IP1's case in context. First, it did not consider that any of the elements of the western section of its proposal would cause substantial harm to designated heritage assets ([73] above). Second, it considered that there would be a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall ([75] above).

249. The Panel recorded the position of IP2 as having been satisfied that IP1 had undertaken "an options appraisal in relation to the alternatives to the route of a highway in place of the A303…." (PR 5.4.55). Once again "options appraisal" referred to the term used in paragraph 4.27 of the NPSNN. IP1 also asks the court to note PR 5.4.54 and 5.4.63 where the Panel recorded that IP2 had said that they were satisfied that the EIA had addressed alternatives, relying also upon the HIA, including the text quoted in [247] above from paragraph 7.3.12. However, it was not suggested that IP2 addressed the issue whether the relative merits of alternatives needed to be considered by the SST in order to meet common law or policy requirements under the NPSNN for the protection of heritage assets and their settings. Nor has the court been shown any assessment by IP2, which was before the Panel or SST, agreeing with IP1's additional contention that the extended tunnel options would bring only minimal benefits in heritage terms.

250. In its conclusions the Panel said that it was satisfied that IP1 had carried out a "full options appraisal" for the project in achieving its selection for inclusion in the RIS[1] as referred to in paragraph 4.27 of the NPSNN. The Panel also relied upon IP2's view that "the EIA has addressed alternatives" and that IP1 had carried out an options appraisal on alternatives for the route of a highway to replace the A303 as it passes through the WHS (PR 5.4.63). The Panel stated that the criticisms made by interested parties of the appraisal process and public consultation did not alter its view that a full options appraisal had been carried out by IP1 (PR 5.4.67). Importantly, the Panel referred

[1] For a discussion of the statutory regime under which Road Investment Strategies are set see *R (Transport Action Network v Secretary of State for Transport* [2021] EWHC 2095 (Admin)

expressly to IP1's case that because the scheme retained its status in the RIS, "further option testing need not be considered by the [Panel] or by the [SST]" (PR 5.4.68). The Panel also referred to the "full response" which IP1 had given on the alternatives referred to by interested parties, noting that IP1 had "explained" its reasons for their rejection and the selection of the scheme route. The Panel said that it found "no reason to question the method and approach of the appraisal process that led to that outcome" (PR 5.4.69).

251. After noting the views of the WHC (PR 5.4.70), the Panel then reached this highly important conclusion at PR 5.4.71:-

> "However, insofar as the options appraisal is concerned, the ExA is content that the Applicant's approach to the consideration of alternatives is in accordance with the NPSNN. It is satisfied that the Applicant has undertaken a proportionate consideration of alternatives as part of the investment decision making process. *Since that exercise has been carried out, it is not necessary for this process to be reconsidered by the ExA or the decision maker*." (emphasis added)

This simply restated paragraph 4.27 of the NPSNN.

252. The Panel addressed the EIA requirement for assessment of alternatives in PR 5.4.72 to 5.4.73. Its conclusions focused on the adequacy of the description in the ES of IP1's study of alternatives. Consistent with what it had just said in PR 5.4.71, the Panel did not make its own appraisal of the relative merits of the proposed scheme and alternatives, in particular the longer tunnel option, despite the fact that subsequently in section 5.7 of its report, the Panel went on to make a number of strong criticisms of the proposed western section which subsequently drove its recommendation that the application for development consent be refused.

253. In PR 5.4.74 the Panel addressed alternatives in the context of compulsory acquisition. But it is not suggested that that addressed alternatives to, for example, the western cutting. Instead, the Panel referred to land required for the deposit of tunnel arisings.

254. The Panel's overall conclusions at PR 5.4.75 was:-

> "The ExA concludes that there are no policy or legal requirements that would lead it to recommend that development consent be refused for the Proposed Development in favour of another alternative."

255. Similarly at PR 7.2.28 the Panel concluded:-

> "The ExA is satisfied that the Applicant has carried out a proportionate option consideration of alternatives as part of the investment decision making process which led to the inclusion of the scheme within RIS1. It concludes that the Applicant has complied with the NPSNN, paragraphs 4.26 and 4.27. There are no policy, or legal requirements that would lead the ExA to

> recommend that consent be refused for the Proposed Development in favour of another alternative."

256. In his decision letter the SST merely stated that the impacts of a number of factors, including alternatives, were neutral (DL 63). In relation to alternatives, the SST relied upon section 5.4 of the Panel's report and PR 7.2.28. He said that he saw "no reason to disagree with the [Panel's] reasoning and conclusions on these matters."

257. Accordingly, both the Panel and the SST considered alternatives on the same basis as IP1, in that it was necessary to consider alternatives, but only in relation to whether an options appraisal had been carried out, whether the ES produced by IP1 had complied with the EIA Regulations 2017 and whether compulsory acquisition of land was justified. Although regulation 21(1) of the EIA Regulations 2017 required the SST to take into account the "environmental information", which included the representations made on the ES (see [31] above), the Panel and the SST did not go beyond assessing the adequacy of the assessment of alternatives in the ES for the purposes of compliance with that legislation. Neither the Panel nor the SST expressed any conclusions about whether the provision of a longer tunnel would achieve only "minimal benefits" as claimed by IP1 in its evidence to the Examination (PR 5.4.20), taking into account not only the costs of the alternatives but also the level of harm to heritage assets which would result from the proposed scheme.

258. Accordingly, the approach taken by the Panel and by the SST under the EIA Regulations 2017 did not go beyond that set out in PR 5.4.71. Yet these were vitally important issues raised in relation to a heritage asset of international importance by WHC, ICOMOS and many interested parties, including archaeological experts. It is also necessary to keep in mind the nature of the western section of the proposal which had given rise to so much controversy. The Panel pithily described it as the greatest physical change to the Stonehenge landscape in 6000 years and a change which would be permanent and irreversible, unlike a road constructed on the surface of the land (PR 5.7.224 to 5.7.225 and 5.7.247). Does the approach taken by the Panel and adopted by the SST disclose an error of law?

259. It is necessary to return to the NPSNN. Paragraph 4.26 begins by stating a general principle, that an applicant should comply with "all legal requirements" and "any policy requirements set out in this NPS" on the assessment of alternatives. The NPSNN goes on to set out requirements which should be considered "in particular," namely the EIA Directive and the Water Framework Directive and "policy requirements in the NPS for the consideration of alternatives." But those instances are not exhaustive. "Legal requirements" include any arising from judicial principles set out in case law as well as the Habitats Regulations 2017. Similarly, the references in paragraph 4.26 to developments in National Parks, the Norfolk Broads and AONBs and flood risk assessment are given only as examples of policy requirements for the assessment of alternatives.

260. But the Panel, and by the same token, the SST, applied paragraph 4.27 of the NPSNN, which states that where a project has been subject to full options testing for the purposes of inclusion in a RIS under the IA 2015 it is *not necessary* for the Panel or the decision-maker to reconsider this process; instead, they should be satisfied that the assessment has been carried out. On a proper interpretation of the NPSNN, I do not consider that where paragraph 4.27 is satisfied (i.e. there has been full options testing for the purposes

of a RIS) the applicant does not need to meet any requirements arising from paragraph 4.26. As the NPSNN states, a RIS is an "investment decision-making process". For example, page 91 of the current RIS, "Road Investment Strategy 2: 2020-2025", explains that the document makes an investment commitment to the projects listed on the assumption that they can "secure the necessary planning consents." "Nothing in the RIS interferes with the normal planning consent process."[2]

261. A few examples suffice to illustrate why paragraph 4.27 of the NPSNN cannot be treated as overriding paragraph 4.26. First, a scheme may require appropriate assessment under the Habitats Regulations 2017 and the consideration of alternatives by the competent authority, following any necessary consultations (regulations 63 and 64). Those obligations on the competent authority (which are addressed in para. 4.24 of the NPSNN) cannot be circumvented by reliance upon paragraph 4.27 of the NPSNN.

262. Second, even if a full options appraisal has been carried out for the purposes of including a project in a RIS, that may not have involved all the considerations which are required to be taken into account under the development consent process, or there may have been a change in circumstance since that exercise was carried out. In the present case page 3-3 of chapter 3 of the ES stated that the options involving a 4.5 km tunnel (i.e. a western extension) all involved costs significantly in excess of the available budget and so had not been considered further. During the Examination IP1 stated in a response to questions from the Panel that it also considered that extending the tunnel to the west would provide only "minimal benefit" in heritage terms (PR 5.4.20). That was an additional and controversial issue in the Examination which fell to be considered by the Panel.

263. Third, the options testing for a RIS may rely upon a judgment by IP1 with which the Panel disagrees and which therefore undermines reliance upon that exercise and paragraph 4.27 of the NPSNN. In the present case IP1's assessment that the extended tunnel options would bring minimal benefit in heritage terms cannot be divorced from its judgments that (i) no part of its proposed scheme would cause substantial harm to any designated heritage asset ([71] above) and (ii) there would be a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall ([75] above). By contrast, the Panel explained why it considered that (i) the western section of the proposal would cause substantial harm to the settings of assets ([97-98] above) and (ii) there would be harm to six attributes of the OUV (including great or major harm to three attributes), the integrity and authenticity of the WHS would be substantially and permanently harmed, and its authenticity seriously harmed ([101 to 103] above). In such circumstances, it was irrational for the Panel to treat the options testing carried out by IP1 as making it unnecessary to assess the relative merits of the tunnel alternatives for themselves, *a fortiori* if there was a policy or legal requirement for that matter to be considered by the decision-maker.

264. The Panel's finding that substantial harm would be caused to a WHS, an asset of the "highest significance" meant that paragraph 5.131 of the NPSNN was engaged (see [46]

[2] See *R (Transport Action Network v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [28]-[37] and [96(vii)].

above). On that basis it would have been "wholly exceptional" to treat that level of harm as acceptable.

265. Furthermore, on the Panel's view paragraph 5.133 of the NPSNN was engaged. It would follow that the application for consent was to be refused unless it was demonstrated that the substantial harm was "necessary" in order to deliver substantial public benefits outweighing that harm. It is relevant to note that this policy also applies to the complete loss of a heritage asset. In such circumstances, it is obviously material for the decision-maker (and any reporting Inspector or Panel) to consider whether it was unnecessary for that loss or harm to occur in order to deliver those benefits. The test is not merely a balancing exercise between harm and benefit. Accordingly, relevant alternatives for achieving those benefits are an obviously material consideration. However, although in the present case the Panel made its vitally important finding of substantial harm, it simply carried out a balancing exercise without also applying the necessity test. In the Panel's judgment the proposal failed simply on the balance of benefits and harm, even without considering whether any alternatives would be preferable (see [120]). Because the Panel approached the matter in that way, the SST did not have the benefit of the Panel's views on the relative merits of the extended tunnel options compared to the proposed scheme.

266. The SST differed from the Panel in that he considered the western section of the scheme would cause less than substantial harm. Consequently, paragraph 5.134 of the NPSNN was engaged. That only required the balancing of heritage harm against the public benefits of the proposal without also imposing a necessity test. However, when it came to striking the overall planning balance, the SST relied upon the need for the scheme and the benefits it would bring (see [130] and [140-141] above).

267. Furthermore, the SST did not differ from the Panel in relation to the effect of the western section on attributes of the OUV and the integrity and authenticity of the WHS. He also accepted the Panel's view that the beneficial effects of the scheme on the OUV did not outweigh the harm caused (see [139] and [142 to 144] above).

268. The principles on whether alternative sites or options may permissibly be taken into account or whether, going further, they are an "obviously material consideration" which must be taken into account, are well-established and need only be summarised here.

269. The analysis by Simon Brown J (as he then was) in *Trusthouse Forte v Secretary of State for the Environment* (1987) 53 P & CR 293 at 299-300 has subsequently been endorsed in several authorities. First, land may be developed in any way which is acceptable for planning purposes. The fact that other land exists upon which the development proposed would be yet more acceptable for such purposes would not justify the refusal of planning permission for that proposal. But, secondly, where there are clear planning objections to development upon a particular site then "it may well be relevant and indeed necessary" to consider where there is a more appropriate site elsewhere. "This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it." Examples of this second situation may include infrastructure projects of national importance. The judge added that even in some cases which have these characteristics, it may not be necessary to consider alternatives if the environmental impact is relatively slight and the objections not especially strong.

270. The Court of Appeal approved a similar set of principles in *R (Mount Cook Land Limited) v Westminster City Council* [2017] PTSR 116 at [30]. Thus, in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant. In those "exceptional circumstances" where alternatives might be relevant, vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant, or where relevant, should be given little or no weight.

271. Essentially the same approach was set out by the Court of Appeal in *R (Jones) v North Warwickshire Borough Council* [2001] PLCR 31 at [22] to [30]. At [30] Laws LJ stated:-

> "……. it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking—and I lay down no fixed rule, any more than did Oliver L.J. or Simon Brown J.—such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question."

272. In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P&CR 19 Carnwath LJ emphasised the need to draw a distinction between two categories of legal error: first, where it is said that the decision-maker erred by taking alternatives into account and second, where it is said that he had erred by failing to take them into account ([17] and [35]). In the second category an error of law cannot arise unless there was a legal or policy requirement to take alternatives into account, or such alternatives were an "obviously material" consideration in the case so that it was irrational not to take them into account ([16] to [28]).

273. In *R (Langley Park School for Girls Governing Body) v Bromley London Borough Council* [2009] EWCA Civ 734 the Court of Appeal was concerned with alternative options within the same area of land as the application site, rather than alternative sites for the same development. In that case it was necessary for the decision-maker to consider whether the openness and visual amenity of Metropolitan Open Land ("MOL") would be harmed by a proposal to erect new school buildings. MOL policy is very similar to that applied within a Green Belt. The local planning authority did not take into account the claimant's contention that the proposed buildings could be located in a less open part of the application site resulting in less harm to the MOL. Sullivan LJ referred to the second principle in *Trusthouse Forte* and said that it must apply with equal, if not greater, force where the alternative suggested relates to different siting within the same application site rather than a different site altogether ([45 to 46]). He added that no "exceptional circumstances" had to be shown in such a case ([40]).

274. At [52-53] Sullivan LJ stated:-

> "52. It does not follow that in every case the "mere" possibility that an alternative scheme might do less harm must be given no

> weight. In the Trusthouse Forte case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. There is no "one size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc.) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.
>
> 53.Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. In the present case the members were not asked to make that judgment. They were effectively told at the onset that they could ignore Point (b), and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application."

275. The decision cited by Mr Taylor QC in *First Secretary of State v Sainsbury's Supermarkets Limited* [2007] EWCA Civ 1083 is entirely consistent with the principles set out above. In that case, the Secretary of State did in fact take the alternative scheme promoted by Sainsbury's into account. He did not treat it as irrelevant. He decided that it should be given little weight, which was a matter of judgment and not irrational ([30 and 32]). Accordingly, that was not a case, like the present one[3], where the error of law under consideration fell within the second of the two categories identified by Carnwath LJ in *Derbyshire Dales District Council* (see [272] above).

276. The wider issue which the Court of Appeal went on to address at [33] to [38] of the *Sainsbury's* case does not arise in our case, namely must *planning permission be refused* for a proposal which is judged to be "acceptable" because there is an alternative scheme which is considered to be more acceptable. True enough, the decision on acceptability in that case was a balanced judgment which had regard to harm to heritage assets, but that was undoubtedly an example of the first principle stated in *Trusthouse*

[3]Which is to do with a failure to assess the relative merits of identified alternatives.

Forte (see [269] above). The court did not have to consider the second principle, which is concerned with whether a decision-maker may be obliged to take an alternative *into account*. Indeed, in the present case, there is no issue about whether alternatives for the western cutting should have been taken into account. As I have said, the issue here is narrower and case-specific. Was the SST entitled to go no further, in substance, than the approach set out in paragraph 4.27 of the NPSNN and PR 5.4.71?

277. In my judgment the clear and firm answer to that question is no. The relevant circumstances of the present case are wholly exceptional. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the SST was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account[4]. I reach this conclusion for a number of reasons, the cumulative effect of which I judge to be overwhelming.

278. First, the designation of the WHS is a declaration that the asset has "outstanding universal value" for the cultural heritage of the world as well as the UK. There is a duty to protect and conserve the asset (article 4 of the Convention) and there is the objective *inter alia* to take effective and active measures for its "protection, conservation, presentation and rehabilitation" (article 5). The NPSNN treats a World Heritage Site as an asset of "the highest significance" (para. 5.131).

279. Second, the SST accepted the specific findings of the Panel on the harm to the settings of designated heritage assets (e.g. scheduled ancient monuments) that would be caused by the western cutting in the proposed scheme. He also accepted the Panel's specific findings that OUV attributes, integrity and authenticity of the WHS would be harmed by that proposal. The Panel concluded that that overall impact would be "significantly adverse", the SST repeated that (DL 28) and did not disagree (see [137], [139] and [144] above).

280. Third, the western cutting involves large scale civil engineering works, as described by the Panel. The harm described by the Panel would be permanent and irreversible.

281. Fourth, the western cutting has attracted strong criticism from the WHC and interested parties at the Examination, as well as in findings by the Panel which the SST has accepted. These criticisms are reinforced by the protection given to the WHS by the objectives of Articles 4 and 5 of the Convention, the more specific heritage policies contained in the NPSNN and by regulation 3 of the 2010 Regulations.

282. Fifth, this is not a case where no harm would be caused to heritage assets (see *Bramshill* at [78]). The SST proceeded on the basis that the heritage benefits of the scheme, in particular the benefits to the OUV of the WHS, did not outweigh the harm that would be caused to heritage assets. The scheme would not produce an overall net benefit for the WHS. In that sense, it is not acceptable *per se*. The acceptability of the scheme depended upon the SST deciding that the heritage harm (and in the overall balancing exercise *all* disbenefits) were outweighed by the need for the new road and *all* its other benefits. This case fell fairly and squarely within the exceptional category of cases

[4] It should be recorded that neither the Panel nor the SST considered exercising any discretion to consider the relative merits of alternative options for extending the proposed tunnel to the west, given PR 5.4.71 and their reliance upon para. 4.27 of the NPSNN.

identified in, for example, *Trusthouse Forte*, where an assessment of relevant alternatives to the western cutting was required (see [269] above).

283. The submission of Mr. Strachan QC that the SST has decided that the proposed scheme is "acceptable" so that the general principle applies that alternatives are irrelevant is untenable. The case law makes it clear that that principle does not apply where the scheme proposed would cause significant planning harm, as here, and the grant of consent *depends* upon its adverse impacts being outweighed by need and other benefits (as in para. 5.134 of the NPSNN).

284. I reach that conclusion without having to rely upon the points on which the claimant has succeeded under ground 1(iv). But the additional effect of that legal error is that the planning balance was not struck lawfully and so, for that separate reason, the basis upon which Mr. Strachan QC says that the SST found the scheme to be acceptable collapses.

285. Sixth, it has been accepted in this case that alternatives should be considered in accordance with paragraphs 4.26 and 4.27 of the NPSNN. But the Panel and the SST misdirected themselves in concluding that the carrying out of the options appraisal for the purposes of the RIS made it unnecessary for them to consider the merits of alternatives for themselves. IP1's view that the tunnel alternatives would provide only "minimal benefit" in heritage terms was predicated on its assessments that no substantial harm would be caused to any designated heritage asset and that the scheme would have slightly *beneficial* (not adverse) effects on the OUV attributes, integrity and authenticity of the WHS. The fact that the SST accepted that there would be net harm to the OUV attributes, integrity and authenticity of the WHS (see [139] and [144] above) made it irrational or logically impossible for him to treat IP1's options appraisal as making it unnecessary for him to consider the relative merits of the tunnel alternatives. The options testing by IP1 dealt with those heritage impacts on a basis which is inconsistent with that adopted by the SST.

286. Seventh, there is no dispute that the tunnel alternatives are located within the application site for the DCO. They involve the use of essentially the same route and certainly not a completely different site or route. Accordingly, as Sullivan LJ pointed out in *Langley Park* (see [246] above), the second principle in *Trusthouse Forte* applies with equal, if not greater force.

287. Eighth, it is no answer for the defendant to say that DL 11 records that the SST has had regard to the "environmental information" as defined in regulation 3(1) of the EIA Regulations 2017. Compliance with a requirement to take information into account does not address the specific obligation in the circumstances of this case to compare the relative merits of the alternative tunnel options.

288. Ninth, it is no answer for the defendant to say that in DL 85 the SST found that the proposed scheme was in accordance with the NPSNN and so s.104(7) of the PA 2008 may not be used as a "back door" for challenging the policy in paragraph 4.27 of the NPSNN. I have previously explained why paragraph 4.27 does not override paragraph 4.26 of the NPSNN, and does not disapply the common law principles on when alternatives are an obviously material consideration. But in addition the SST's finding that the proposal accords with the NPSNN for the purposes of s.104(3) of the PA 2008 is vitiated (a) by the legal error upheld under ground 1(iv) and, in any event, (b) by the

legal impossibility of the SST deciding the application in accordance with paragraph 4.27 of the NPSNN.

289. I should add for completeness that neither the Panel nor the SST suggested that the extended tunnel options need not be considered because they were too vague or inchoate. That suggestion has not been raised in submissions.

290. For all these reasons, I uphold ground 5(iii) of this challenge.

Conclusions

291. The court upholds two freestanding grounds of challenge, 1(iv) and 5(iii). Permission is granted to the claimant to apply for judicial review in relation to those grounds.

292. Permission is refused to apply for judicial review in respect of all other grounds on the basis that each of them is unarguable.

293. There is no basis for the court to hold that relief should be withheld under s.31(2A) of the Senior Courts Act 1981. It is self-evident from the nature of each of the grounds I have upheld that it cannot be said that it is highly likely that the application for development consent would still have been granted if neither error had been made.

294. The claim for judicial review succeeds to the extent I have indicated. The claimant is entitled to an order quashing the SST's decision to grant development consent and the DCO itself.

Appendix 1 – Legal principles agreed between the parties

1. The general legal principles applicable to a judicial review of this kind are well-established. Amongst other things:

    a. There is a clear and basic distinction between questions of interpretation of policy and the application of policy and matters of planning judgment. The Court will not interfere with matters of planning judgment other than on legitimate public law grounds: see for example *Client Earth* at [101] and [103] [4/9/203- 204], applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 and *St Modwen Developments v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643; [2017] PTSR 476 at [7].

    b. Decision Letters should be read (1) fairly and in good faith, and as a whole; (2) in a straightforward and down-to-earth manner, without excessive legalism or criticism; and (3) as if by a well-informed reader who understands the principal controversial issues in the case: see *St Modwen* above and the principles *in Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153, 164E-G).

    c. Reasons given for a decision must be intelligible, adequate and enable the reader to understand why the matter was decided as it was: see for example *South Bucks DC v Porter* (No 2) [2004] 1 WLR 1953. The question is whether the reasons given leave room for genuine, as opposed to forensic, doubt as to what was decided and why (*R (CPRE Kent) v Dover District Council* [2017] UKSC 79 at [42]). Reasons can be briefly stated and there is no requirement to address each and every point made, provided that the reasons explain the decision maker's conclusions on the principal important controversial issues. In circumstances where the Secretary of State disagrees with a recommendation from a planning inspector, there is no different standard of reasons: see *Client Earth* High Court judgment at [146] and *Secretary of State for Communities and Local Government v Allen* [2016] EWCA Civ 767 at [19]. However, 'if disagreeing with an inspector's recommendation the Secretary of State is…required to explain why he rejects the inspector's view' see *Horada v SSCLG* [2016] EWCA Civ 169, at [40]. Similarly, in the heritage context, the need to give considerable importance and weight to listed building preservation does not change the standard of legally adequate reasons for granting planning permission: see *Mordue v Secretary of State for Communities and Local Government* [2015] EWCA Civ 29434 1243 at [24]-[26]. Reasons do not need to be given for the way in which every material consideration has been dealt with (*HJ Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 668).

    d. The judgment of Lewis J. in *R (Mars Jones) v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 1111 (Admin) has applied the South Bucks standard of reasons to development consent decisions (at [47]).

    e. Where it is alleged that a decision-maker has failed to take into account a material consideration, it is insufficient for a claimant simply to say that the decision-maker has failed to take into account a material consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into

account. But a decision-maker does not fail to take a relevant consideration into account unless he was under an obligation to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account: see *Client Earth* at [99] applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221

f. The interpretation of planning policy is a matter for the court. In *R (Scarisbrick v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787, the Court of Appeal considered the interpretation of national policy statement for nationally significant hazardous waste infrastructure under the Planning Act 2008. See paragraphs 5-8. Lindblom LJ (with whom the other Lord Justices agreed) held:

> "19. The court's general approach to the interpretation of planning policy is well established and clear (see the decision of the *Supreme Court in Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13 , in particular the judgment of Lord Reed at paragraphs 17 to 19). The same approach applies both to development plan policy and statements of government policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd* . and *Richborough Estates Partnership LLP v Cheshire East Borough Council* [2017] UKSC 37 , at paragraphs 22 to 26). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see paragraph 18 of Lord Reed's judgment in *Tesco Stores v Dundee City Council*). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see paragraph 18 of Lord Reed's judgment in *Tesco v Dundee City Council*). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paragraphs 24 to 26 of Lord Carnwath's judgment in *Suffolk Coastal District Council*). It is not suggested that those basic principles are inapplicable to the NPS – notwithstanding the particular statutory framework within which it was prepared and is to be used in decision making."

Heritage Assessment - The Statutory Duty

2. Regulation 3 of the 2010 Regulations states:

> (1) When deciding an application which affects a listed building or its setting, the Secretary of State must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.
>
> (2) When deciding an application relating to a conservation area, the Secretary of State must have regard to the desirability of preserving or enhancing the character or appearance of that area.
>
> (3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the Secretary of State must have regard to the desirability of preserving the scheduled monument or its setting.

3. The 2010 Regulations do not address World Heritage Sites, although they do address individual scheduled monuments, listed buildings etc. within a World Heritage Site.

4. The equivalent sections applying to listed buildings and conservation areas in relation to planning decisions are in s66(1) and s72(1) Planning (Listed Buildings and Conservation Areas) Act 1990 ('the Listed Buildings Act'). These state:

> "66(1) In considering whether to grant planning permission…for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."
>
> "72(1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

5. The case law concerning the wording of the statutory duties in the Listed Buildings Act refers to the decision maker being required to give 'considerable importance and weight' to the desirability of: (a) preserving listed buildings or their settings, (b) preserving or enhancing the character or appearance of a conservation area, (c) preserving scheduled monuments or their settings (see *East Northamptonshire District Council v SSCLG* [2015] 1 WLR 45 the Court of Appeal (following *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141 and *The Bath Society v SSE* [1991] 1 W.L.R.1303)).

6. In *Forge Field v Sevenoaks DC* [2014] EWHC 1895 Lindblom J (as he then was) stated in respect of duties in the Listed Buildings Act that:

> "There is a statutory presumption, and a strong one, against granting planning permission for any development which would fail to preserve the setting of a listed building or the character or appearance of a conservation area" (at [45]).

The Judge went on [49]:

> "…an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering."

7. The case of South Lakeland (above) confirmed that the concept of 'preserving' under the Listed Buildings Act means 'doing no harm' (per Lord Bridge of Harwich at pp 149- 50).

8. Lindblom LJ provided further guidance in relation to the duty in relation to the settings of listed buildings under the Listed Buildings Act in Catesby Estates v Steer [2018] EWCA Civ 1697. He highlighted that:

> a. 'the s. 66(1) duty, where it relates to the effect of a proposed development on the setting of a listed building, makes it necessary for the decision-maker to understand what that setting is—even if its extent is difficult or impossible to delineate exactly—and whether the site of the proposed development will be within it or in some way related to it. Otherwise, the decision-maker may find it hard to assess whether and how the proposed development "affects" the setting of the listed building, and to perform the statutory obligation to "have special regard to the desirability of preserving … its setting …"' [28]
>
> b. '…though this is never a purely subjective exercise, none of the relevant policy guidance and advice prescribes for all cases a single approach to identifying the extent of a listed building's setting. Nor could it. In every case where that has to be done, the decision-maker must apply planning judgment to the particular facts and circumstances, having regard to relevant policy, guidance and advice. The facts and circumstances will change from one case to the next.' [29]
>
> c. 'the effect of a particular development on the setting of a listed building— where, when and how that effect is likely to be perceived, whether or not it will preserve the setting of the listed building, whether, under government policy in the NPPF, it will harm the "significance" of the listed building as a heritage asset, and how it bears on the planning balance—are all matters for the planning decision-maker, subject, of course, to the principle emphasized by this court in East Northamptonshire District Council v Secretary of State for Communities and Local Government [2015] 1 W.L.R. 45 (at [26] to [29]), Jones v Mordue [2016] 1 W.L.R. 2682 (at [21] to [23]), and Palmer (at [5]), that "considerable importance and weight" must be given to the desirability of preserving the setting of a heritage asset. Unless there has been some clear error of law in the decision-maker's approach, the court should not intervene (see Williams,

> at [72]). For decisions on planning appeals, this kind of case is a good test of the principle stated by Lord Carnwath in Hopkins Homes Ltd. v Secretary of State for Communities and Local Government [2017] 1 W.L.R. 1865 (at [25]) - that "the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly".' [30].

9. The most recent judgment of the Court of Appeal addressing paragraph 196 NPPF is *City and Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 320. In that case the Court confirmed that neither 29838 paragraph 196 NPPF nor s66(1) Listed Buildings Act 1990 require an internal heritage balance to be conducted in order to arrive at the level of harm to an asset before weighing that harm against public benefits. The key passages of the judgment are at [71]-[81].

Appendix 2 – Paragraphs 25 to 43 and 50 of the decision letter

25. The Secretary of State notes the ExA's consideration of cultural heritage and the historic environment in Chapter 5.7 of the Report and the differing positions on this matter among others of: Wiltshire Council [ER 5.7.55 – 5.7.61]; the Historic Buildings and Monuments Commission for England ("Historic England") [ER 5.7.62 – 5.7.69]; the National Trust [ER 5.7.70 – 5.7.71]; English Heritage Trust [ER 5.7.72]; International Council on 7 Monuments and Sites ("ICOMOS") Missions [ER 7.7.73 – 5.7.80]; Department for Digital, Culture, Media and Sport ("DCMS") [ER 5.7.81 – 5.7.83]; International Council on Monuments and Sites, UK ("ICOMOS-UK") [ER 5.7.84 – ER 5.7.98]; Stonehenge and Avebury World Heritage Site Coordination Unit ("WHSCU") [ER 5.7.99 – ER 5.7.104]; the Stonehenge Alliance (comprising: Ancient Sacred Landscape Network, Campaign for Better Transport, Campaign to Protect Rural England, Friends of the Earth, and Rescue: The British Archaeological Trust) [ER 5.7.105 – 5.7.108]; the Consortium of Archaeologists and the Blick Mead Project Team ("COA") [ER 5.7.109 – 5.7.120]; and the Council for British Archaeology ("CBA") and CBA Wessex [ER 5.7.121 – 5.7.128].

26. Central to the Secretary of State's consideration of cultural heritage and historic environment is the question of the Development's conformity with the NPSNN and whether substantial or less than substantial harm is caused to the Outstanding Universal Value ("OUV") of the WHS. The NPSNN (paragraphs 5.131-5.134) states that substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, should be wholly exceptional and that any harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of the development, recognising that the greater the harm to the significance of the heritage site, the greater the justification that will be needed for any loss. Where the Development would lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm. Where the Development will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal.

27. The Secretary of State notes that the concept of OUV has evolved and been incorporated in the UNESCO document 'The Operational Guidelines ("OG") for the Implementation of the World Heritage Convention'3 , which have been regularly revised since 1977 (the latest update

being in 2019). It is noted that the term OUV is defined in paragraph 49 of the OG as meaning: 'Outstanding Universal Value means cultural and/or national significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity'. The Secretary of State notes the UNESCO definitions of criteria for inscription of the WHS on the World Heritage List [ER 2.2.2] and the description of the attributes of OUV4 [ER 2.2.6] has been set out by the ExA. The WHS Management Plan that was adopted for the WHS in 2015 sets out the vision and management priorities for the WHS to sustain its OUV [ER 3.13.1 - 3.13.2]. The ExA has also considered the local Development Plan, National Planning Policy Framework ("NPPF"), and the Statement of Outstanding Universal Value that exists for the WHS as important and relevant matters [ER 5.7.13 - 5.7.17].

28. The ExA concludes the Development would benefit the OUV in certain valuable respects, especially relevant to the present generation. However, permanent irreversible harm, critical to the OUV would also occur, affecting not only present, but future generations. It considers the benefits to the OUV would not be capable of offsetting this harm and that the overall effect on the WHS OUV would be significantly adverse [ER 5.7.321]. The ExA considers the Development's impact on OUV does not accord with the Wiltshire Core Strategy Core Policies 59 and 58, which aim to sustain the OUV of the WHS and ensure the conservation of the historic environment [ER 5.7.322 – 5.7.324], and that the Development is also not consistent with Policy 1d of the WHS Management Plan [ER 5.7.325]. It considers this is a factor to which substantial weight can be attributed [ER 7.5.11].

29. In the ExA's overall heritage assessment [ER 5.7.327 – 5.7.333] the ExA considers the cultural heritage analysis and assessment methodology adopted by the Applicant appropriate, subject to certain points of criticism. These include poor consideration of the influence of the proposed Longbarrow Junction on OUV; inadequate attention paid to the less tangible and dynamic aspects of setting, as well as the absence of consideration of certain settings; and concerns regarding the consideration given to the interaction and overall summation of effects. The ExA took these points into account in its assessment [ER 5.7.327]. The ExA is also content overall with the mitigation strategy, apart from the proposed approach to artefact sampling and various other points identified. As set out in Appendix E to its Report the ExA recommends the Secretary of State considers resolving these matters if the decision differs from the recommendation [ER 5.7.328].

30. On the effects of the Development on spatial relations, visual relations and settings, the ExA concludes that substantial harm would arise. This conclusion does not accord with that of Historic England, but is based on the ExA's professional judgments, having regard to the entirety of evidence on cultural heritage [ER 5.7.329]. In particular, the ExA places great weight on the effects of the spatial division of the cutting, in combination with the presence of the Longbarrow Junction on the physical connectivity between the monuments and the significance that they derive from their settings. This includes the physical form of the valleys, with their historic significance for past cultures, and the presence of archaeological remains [ER 5.7.330].

31. The ICOMOS mission reports and the WH Committee decisions, alongside the submissions of DCMS, in the context of the remainder of the evidence examined have been noted by the ExA and it regards the reports and decisions as both relevant and important, but not of such weight as to be determinative in themselves [ER 5.7.331].

32. The Secretary of State notes the ExA's approach has been to integrate cumulative and in-combination effects into its assessment, where relevant and that the ExA agrees with the outcome of the Applicant's exercise that cumulative effects arising from the future baseline would not be significant, and that adequate mitigation has been arranged in respect of in-combination effects during construction and operation [ER 5.7.332].

33. It is the ExA's opinion that when assessed in accordance with NPSNN, the Development's effects on the OUV of the WHS, and the significance of heritage assets through development within their settings taken as a whole would lead to substantial harm [ER 5.7.333]. However, the Secretary of State notes the ExA also accepts that its conclusions in relation to cultural heritage, landscape and visual impact issues and the other harms identified, are ultimately matters of planning judgment on which there have been differing and informed opinions and evidence submitted to the examination [ER 7.5.26]. The Secretary of State notes the ExA's view on the level of harm being substantial is not supported by the positions of the Applicant, Wiltshire Council, the National Trust, the English Heritage Trust, DCMS and Historic England. These stakeholders place greater weight on the benefits to the WHS from the removal of the existing A303 road compared to any consequential harmful effects elsewhere in the WHS. Indeed, the indications are that they 9 consider there would or could be scope for a net benefit overall to the WHS [ER 5.7.54, ER 5.7.55, ER 5.7.62, ER 5.7.70, ER 5.7.72 and ER 5.7.83].

34. The Secretary of State notes the differing positions of the ExA and Historic England, who has a duty under the provisions of the National Heritage Act 1983 (as amended) to secure the preservation and enhancement of the historic environment. He agrees with the ExA that there will be harm on spatial, visual relations and settings that weighs against the Development. However, he notes that there is no suggestion from Historic England that the level of harm would be substantial. Ultimately, the Secretary of State prefers Historic England's view on this matter for the reasons given [ER 5.7.62 – 5.7.69] and considers it is appropriate to give weight to its judgment as the Government's statutory advisor on the historic environment, including world heritage. The Secretary of State is satisfied therefore that the harm on spatial, visual relations and settings is less than substantial and should be weighed against the public benefits of the Development in the planning balance.

35. Whilst also acknowledging the adverse impacts of the Development, the Secretary of State notes that Historic England's concluding submission [Examination Library document AS-111] states that it has supported the aspirations of the Development from the outset and that putting much of the existing A303 surface road into a tunnel would allow archaeological features within the WHS, currently separated by the A303 road, to be appreciated as part of a reunited landscape, and would facilitate enhanced public access to this internationally important site [ER 5.7.62] and that overall it broadly concurs with the Applicant's Heritage Impact Assessment [ER 5.7.66]. Furthermore, it is also noted from Historic England's concluding submission that it considers the Development proposes a significant reduction in the sight and sound of traffic in the part of the WHS where it will most improve the experience of the Stonehenge monument itself, and enhancements to the experience of the solstitial alignments [ER 5.12.32]. It considers that, alongside enhanced public access, these are all significant benefits for the historic environment.

36. The Secretary of State also notes from Historic England's concluding submission made during the examination [Examination library document AS-111] that its objective through the course of the examination was to ensure that the historic environment is fully and properly taken into account in the determination of the application and, if consented, that appropriate safeguards be built into the Development across the dDCO, OEMP and the Detailed

Archaeological Mitigation Strategy ("DAMS") [ER 5.7.63]. Whilst it is also noted that Historic England identified during the examination a number of concerns where further information, detail, clarity or amendments were needed, particularly around how the impacts of the Development would be mitigated, their concluding submission states that its concerns have been broadly addressed. Historic England believe that the dDCO, OEMP and DAMS set out a process to ensure that heritage advice and considerations can play an appropriate and important role in the construction, operation and maintenance of the Development. As a consequence of the incorporation of the Design Vision, Commitments and Principles in the OEMP, together with arrangements for consultation and engagement with Historic England, it considers sufficient safeguards have been built in for the detailed design stage and there are now sufficient provisions for the protection of the historic environment in the dDCO. It is Historic England's view that the DAMS is underpinned by a series of scheme specific research questions which will ensure that an understanding of the OUV of the WHS and the significance of the historic environment overall will guide decision making and maximise opportunities to further understand this exceptional landscape. It considers the DAMS will also ensure that the archaeological mitigation under the Site Specific Written Schemes of Investigation ("SSWSIs") will be supported by the use of innovative methods 10 and technologies and the implementation of an iterative and intelligent strategy, which will enable it to make a unique contribution to international research agendas.

37. Given the amendments and assurances requested and received during the course of the examination and the safeguards that are now built into the DCO overall, Historic England states in the concluding submission that it is confident of the Development's potential to deliver benefits for the historic environment.

38. The Secretary of State also notes that Historic England would continue to advise the Applicant on the detail of the design and delivery of the Development through its statutory role and its roles as a member of Heritage Monitoring and Advisory Group and of the Stakeholder Design Consultation Group. The ExA agrees with Historic England's view that this would also help minimise impact on the OUV, and delivery of the potential benefits for the historic environment [ER 5.7.69].

39. Historic England's response to the Secretary of State's further consultation on 4 May 2020 also indicates that its advice has addressed the need to avoid any risk of confusion which might impede the successful operation of the processes, procedures and consultation mechanisms set out in the revised DAMS and OEMP designed to minimise the harm to the Stones and surrounding environment of the WHS.

40. Similarly, the Secretary of State also notes the National Trust's support for the Development and view that, if well designed and delivered with the utmost care for the surrounding archaeology and chalk grassland landscape, the Development could provide an overall benefit to the WHS. It also considers the Development could help to reunite the landscape providing improvements to monument setting, tranquillity and access for both people and wildlife. Following initial concerns about the lack of detail in relation to both design and delivery, it is now satisfied that sufficient control measures have been developed through the DAMS and OEMP and also in the dDCO [ER 5.7.70 – 5.7.71]. English Heritage Trust support the scope for linking Stonehenge back to its wider landscape and making it possible for people to explore more of the WHS and welcomes the reconnection of the line of the Avenue [ER 5.7.72]. DCMS also expressed the view that the Development represents a unique opportunity to improve the ability to experience the WHS and its overall impact would be of

benefit to the OUV of the WHS, primarily through the removal of the existing harmful road bisecting the site [ER 5.7.81 – 5.7.83].

41. The Secretary of State notes that whilst Wiltshire Council acknowledge that the most significant negative impact of the Development would be that of the new carriageway, cutting and portal on the western part of the WHS, the Council considers the removal of the existing A303 road would benefit the setting of Stonehenge and many groups of monuments that contribute to its OUV and the removal of the severance at the centre of the WHS caused by the road would improve access and visual connectivity between the monuments and allow the reconnection of the Avenue linear monument. It considers the removal of the existing Longbarrow Roundabout and the realignment of the A360 would also benefit the setting of the Winterbourne Stoke Barrow Group and its visual relationship to other groupings of monuments in the western part of the WHS and the absence of road lighting within the WHS and at the replacement Longbarrow Junction would help reduce light pollution. The rearranged road and byway layout to the east would remove traffic from the vicinity of the scheduled Ratfin Barrows [ER 5.7.55 – 5.7.57].

42. The Secretary of State also notes from the Statement of Common Ground agreed between Wiltshire Council and the Applicant [Examination library document AS-147] that Wiltshire Council's regulatory responsibility include managing impacts on Wiltshire's heritage assets and landscape, in relation to its statutory undertakings. These responsibilities include having regard to the favourable conservation status of the WHS. The document notes that the Development affects several built heritage assets, both designated and undesignated. However, all sites of interest along the route had been visited by the relevant Council officer with the built heritage consultant, and general agreement exists regarding the likely extent of the Development's impacts. Wiltshire Council agreed that there are no aspects that are considered likely to reach a level of 'substantial harm'.

43. The Secretary of State has also carefully considered the ExA's concerns and the respective counter arguments and positions of other Interested Parties, including ICOMOS-UK, WHSCU, the Stonehenge Alliance, the COA and the CBA in relation to the effects of elements of the Development on the OUV of the WHS and on the cultural heritage and the historic environment of the wider area raised during the examination. The Secretary of State notes in particular the concerns raised by some Interested Parties and the ExA in respect of the adverse impact arising from western tunnel approach cutting and portal, the proposed Longbarrow Junction and, to a lesser extent, the eastern approach and portal [ER 5.7.207]. He accepts there will be adverse impacts from those parts of the Development. However, on balance and when considering the views of Historic England and also Wiltshire Council, he is satisfied that any harm caused to the WHS when considered as a whole would be less than substantial and therefore the adverse impacts of the Development should be balanced against its public benefits.

50.....In conclusion on cultural heritage and the historic environment, the Secretary of State places great importance in particular on the views of his statutory advisor, Historic England and also sees no reason to doubt the expertise of those from Historic England or other statutory consultees that have advised on this matter (or indeed on other matters relating to the application). As indicated above, whilst he accepts there will be harm, there is no suggestion from Historic England that the harm will be substantial. The Secretary of State agrees with Historic England on this matter and is also encouraged by the continued role Historic England would have in the detailed design and delivery of the Development should consent be granted. Whilst also acknowledging some Scientific Committee experts are not content with the mitigation

proposed and also that the ExA was not content with the proposed approach to artefact sampling, the Secretary of State accepts Historic England's views on this matter and is satisfied that the mitigation measures included in the updated OEMP and DAMS as submitted by the Applicant on 18 May 2020 and secured by requirements 4 and 5 in the DCO are acceptable and will help minimise harm to the WHS.

TRUSTHOUSE FORTE HOTELS LTD. v. SECRETARY OF STATE FOR THE ENVIRONMENT AND ANOTHER

QUEEN'S BENCH DIVISION (Simon Brown J.): June 13, 1986

Town and country planning—Application for planning permission for a Post House Hotel refused—Applicants contended that no other site suitable—Four alternative sites investigated and rejected—Inspector recommended that need for hotel accommodation could be met on other sites—Whether inspector entitled as a matter of law to reach that conclusion when no alternative site specified—Whether inspector could reasonably come to that conclusion on the evidence before him

The applicants, Trusthouse Forte Hotels Ltd., applied for planning permission to build a Post House Hotel at a site at Hambrook, five miles north east of Bristol city centre. The applicants had been searching for an appropriate site since 1972 and had investigated four alternative sites suggested by the planning authorities, Northavon District Council. The applicants contended that if the appeal site was not available no other site within the area would be suitable for successful development. The appeal site was in the green belt and included high grade agricultural land. The inspector, whose conclusions the Secretary of State for the Environment adopted on appeal against the refusal by the planning authorities of planning permission, identified the central issue as being whether the need for a hotel on this site outweighed the presumption against building in the green belt and the loss of high quality agricultural land. He concluded that if there were a severe shortage of hotel accommodation of this sort, the normal market forces of supply and demand would operate and that the need would be met at an alternative site. The applicants applied to the court under section 246 of the Town and Country Planning Act 1971 to have the decision of the Secretary of State set aside on the grounds that as a matter of law the inspector was not entitled to conclude that the need would be met at some unspecified alternative site and that alternatively there was no evidence on which the inspector could properly have come to that conclusion.

Held, dismissing the application,

(1) As a matter of law, it was open to the planning authority in the present case to conclude that an accepted need could be met elsewhere than upon the application or appeal site without reference to any specific or alternative site. Where the planning objections were sought to be overcome by reference to need, the greater those objections, the more material would be the possibility of meeting that need elsewhere. While it was generally desirable that a planning authority should identify that possibility by reference to specifically identifiable alternative sites, it would not always be essential or appropriate to do so. Where the planning objections related essentially to the development of the application site itself rather than to some intrinsically offensive aspect of the development wherever it might be sited, or where the requirements to be satisfied in order to meet the accepted need were less specific and exacting, the more likely it was that a planning authority could reasonably conclude that the need could be met elsewhere without reference to some identifiable preferable alternative site.

(2) To the extent that the Secretary of State's conclusion, that were there to be a severe shortage of hotel accommodation, normal market forces would operate and the demand for accommodation would be met, was based on the existence of certain facts such as that there were other hoteliers interested in meeting the need and that the planning authority did desire to encourage additional hotel facilities, there was evidence before him which supported that conclusion. To the extent that the conclusion expressed an opinion or judgment

on the likely future course of events, it was well within the scope of the Secretary of State's powers to form such a conclusion. In considering the Secretary of State's decision, it was important to bear in mind that he accepted that the applicants would not build a hotel if the appeal site were not available but considered that the need might be met by some development quite different in location and nature to that proposed by the applicants and that therefore the need could be met otherwise than by allowing the applicants to overcome the planning objections to this particular type of development on this particular site. Consequently, the application to have the decision of the Secretary of State upholding the refusal of planning permission set aside would be dismissed.

Cases cited:

(1) *Banks Horticultural Products* v. *Secretary of State for the Environment* [1980] J.P.L. 33; (1979) 252 E.G. 811.

(2) *Brown* v. *Secretary of State for the Environment* (1978) 40 P. & C.R. 285.

(3) *Greater London Council* v. *Secretary of State for the Environment* (1986) 52 P. & C.R. 158, C.A.

(4) *R.* v. *Carlisle City Council and the Secretary of State for the Environment, ex p. Cumbrian Co-operative Society Ltd.* [1986] J.P.L. 206.

(5) *Rhodes* v. *Minister of Housing and Local Government* [1963] 1 W.L.R. 208; [1963] 1 All E.R. 300; 14 P. & C.R. 122.

(6) *Vale of Glamorgan Borough Council* v. *Secretary of State for Wales* (1986) 52 P. & C.R. 418.

(7) *Westminster Renslade* v. *Secretary of State for the Environment* (1984) 48 P. & C.R. 255.

(8) *Wholesale Mail Order Supplies* v. *Secretary of State for the Environment* [1976] J.P.L. 163; (1975) 237 E.G. 185, D.C.

(9) *Williams (Sir Brandon Rhys)* v. *Secretary of State for Wales and the Welsh Water Authority and Taff Ely Borough Council* [1985] J.P.L. 29, C.A.

(10) *Ynystawe, Ynysforgan and Glais Gypsy Site Action Group* v. *Secretary of State for Wales and West Glamorgan County Council* [1981] J.P.L. 874.

Application by the plaintiffs, Trusthouse Forte Hotels Ltd., under section 246 of the Town and Country Planning Act 1971 to set aside the decision of the first respondent, the Secretary of State for the Environment upholding the decision of the second respondent, Northavon District Council, to refuse planning permission for the development of a hotel at a site at Hambrook five miles north-east of Bristol city centre. The decision was based on the fact that the accepted need for hotel accommodation would be met elsewhere. The applicants sought to have the decision set aside on two grounds (1) as a matter of law the Secretary of State could not base his decision on the availability of an alternative but unspecified site and (2) there was no evidence on which he could properly conclude that there was available an alternative site to the appeal site. The facts are set out in the judgment.

M. Horton for the applicants.
D. Holgate for the first respondent.

SIMON BROWN J. By this application pursuant to section 246 of the Town and Country Planning Act 1971 the applicants seek to quash the decision of the Secretary of State dated October 23, 1984 whereby he dismissed their appeal from the Northavon District Council's refusal of planning permission for the erection of a hotel on green belt land at Hambrook, some five miles north-east of Bristol city centre. The

applicants seek to build what is known as a Post House hotel, a single storey construction of four star category, 90 per cent. of whose customers would be expected to arrive by car.

In arriving at his decision the Secretary of State contented himself with an unvarnished endorsement of his inspector's conclusions and recommendation and thus it has been convenient to treat the inspector's report as if it were itself the decision letter and he the deciding tribunal. I shall continue to treat the matter in this way for the purposes of this judgment.

The decision has been challenged on a number of different grounds which make it necessary to relate several of the inspector's findings of fact and conclusions. This is in any event a convenient way of setting the application in its factual context. Amongst the inspector's findings of fact were these:

> v. The Trust House Forte group is the largest hotel chain in the world enjoying an international reputation for good service. . . . vii. The hotel is expected to perform an active role in encouraging businessmen and tourists to the city. viii. The company consider that certain criteria are essential before a successful hotel can be established. These consist of:—the lower cost of land acquisition, the right location, suitable environment, good accessibility and adequate car parking. The most important requirement, in the appellants' view, is the correct location.
>
> ix. The appellant company have been searching for a suitable site in the Bristol area since 1972. They had previously identified the appeal site as the prime location and a separate survey more recently has confirmed this opinion. x. The Trust House Forte chain are the only hotel group in the country at the moment with a large building programme. They are not prepared to build town centre hotels because of the high costs of land acquisition, the higher costs of building other than single-storey accommodation and the problems of providing adequate and satisfactory car-parking. They are satisfied that the appeal site is the prime location. The appeal site to them represents the only viable site for their Post House development. xi. The site is well located to take advantage of the excellent communications serving the Bristol area and a hotel on the north side of Bristol would be best placed to serve the existing industries and the proposed large scale developments on the north side of the city. . . . xv. The appellant company had extended their search for a suitable site in the Bristol area to a 15-mile radius from the city centre. They have investigated all the other sites suggested by the district council and the Bristol City Council but have rejected them as being unsuitable and not viable propositions. The company maintain that none are so conveniently located to attract trade from the M4 and none have easy access to and from the city centre along the M32.
>
> xvii. In order to be viable the appellants maintain that they have to attract the tourist trade in addition to the businessman. Bristol is conveniently located in relation to many tourist attractions. . . . xxi. Motels have been accepted in the green belt in appeals where a need has been demonstrated. . . . xxvii. The appellants and the

MAFF have carried out independent surveys and auger borings and have agreed that the land is of a high agricultural quality almost entirely Grade 1 and Grade 2 and predominantly Grade 1. . . . xxxii. Policy C1 of the structure plan, following the advice in government circulars indicates that developments wherever possible, should not encroach upon land with the higher agricultural potential. . . . xxxiv. Specific provision has been made at the Aztec West development for a hotel site and also at Cribbs Causeway.

Bearing in mind those facts the inspector set out his conclusions which so far as relevant to this application were as follows:

99. . . . It seems to me that the main issue to be decided is whether or not the need for a hotel on this site is sufficient to outweigh the presumption against building in the green belt and the loss of high quality agricultural land. 100. Although the Bristol Hotels Association do not see any justification for a further hotel in the Bristol area, the overwhelming evidence points to such a need and the council themselves acknowledge the desirability of providing additional good class hotel accommodation. Certainly when the large scale developments planned in the north fringe take place I believe that there is likely to be a severe shortage of suitable accommodation and I note that at least two of the existing major hotels are planning to expand to meet this need. The proposed hotel would be admirably sited to serve the new development and at the same time would provide quick and easy access for visitors who wished to visit the city centre and be conveniently located for most travellers on the motorways approaching from the west, north and east. Apart from the highway aspect to which I have referred I consider that it is a splended location for a hotel. After years of research the appellants are convinced that it is the prime site in the Bristol area and I do not quarrel with that judgment. However, they have gone further in suggesting that it is the only site likely to be developed for a modern hotel in the Bristol area. I must accept that the Trust House Forte Group have made a commercial assessment and concluded that unless they are able to benefit from all the advantages offered by the appeal site they would not be prepared to build and Bristol would be deprived of a modern Post House development. In my opinion, having regard to the undoubtedly high standard of service associated with the group that would be most regrettable albeit there is the existing Post House development at Alveston.
suitable hotel site has extended to a radius of 15 miles around Bristol city centre, which was also included in their search and their arguments would suggest that if the appeal site was not available there was no other site within the area which could be successfully developed for a hotel. Whilst respecting the company's own decision on this point I believe that if there is such a shortage of 3/4 star hotel accommodation, which can only become more acute as the large scale developments progress, then the normal market forces of supply and demand will operate and the demand will be met—given that it is the wish of the responsible authorities to encourage additional and improved hotel facilities in the Bristol area.

102. The appellants in setting out the criteria for the siting of a new hotel placed great stress on the choice of location particularly in relation to principal highway routes and the council accepted that for the Post House type of operation catering predominantly for the motorist good communications were necessary. I acknowledge that the position of the appeal site adjoining the M32 and close to the east/west M4 motorway would provide probably the best opportunity for bringing the hotel to the attention of a large number of motorists visiting the Bristol area. However, the continued success of the company's own Alveston Post House Hotel, some 11 miles from the Bristol centre and not on one of the principal traffic routes would seem to indicate that, whilst clearly desirable from a commercial point of view it is not essential that the hotel should be in the prime position adjoining the motorway. In reaching this conclusion I have had regard to the point made by the appellants that the Alveston hotel has had 20 years in which to build up goodwill but I believe that its success will be derived to a large extent from the excellent reputation enjoyed by the group generally and the fact that many visitors to the Bristol area are apparently prepared to accept the longer drive into the city centre.

103. I appreciate that the company have made a carefully considered commercial judgment in deciding that a Post House type of operation on any other site would not be viable and in reaching this decision they have naturally to take into account the costs involved including the lower costs of single-storey construction and of land purchase outside the central area which would enable a hotel on the appeal site to compete with the city centre hotels by charging a lower tariff. However, I have no doubt that there are many other concerns which would claim to offer a less expensive product to the public if they were allowed to build outside the built-up areas and whilst the commercial implications and economic viability of any proposal should not be ignored in the consideration of a planning application I do not believe that the question of costs can be an overriding factor in this instance and this is accepted by the appellants.

104. In these circumstances I can find no justification for setting aside what, in my opinion, are two of the most basic and stringent planning constraints against development—the green belt and the loss of high quality agricultural land. . . . 105. The appellants further submitted that in any case the proposed development would not be detrimental to the green belt objectives but I consider that at this part the green belt performs a vital function in preventing any extension of the urban outskirts of Bristol, with the A4174 forming a firm and readily identifiable boundary. This is a very vulnerable part of the green belt and should the A4174 line be breached by the granting of consent in this case it would be difficult to resist other proposals in this locality. In my opinion too, any development on the appeal site would be an intrusive feature which would detract from the rural setting which helps to retain the separate identity of Hambrook Village.

106. With regard to the loss of the high quality agricultural land . . . the Government's policy of safeguarding the long-term potential

> of high quality agricultural land has remained unchanged. To overcome this the appellants have relied on their submissions regarding the need for a hotel in the Bristol area but I can find no special circumstances in this case to justify permission being granted.

The inspector then recommended that the appeal be dismissed, a recommendation which, as I have already related, the Secretary of State accepted.

The applicants do not criticise the inspector's identification of the crucial issue arising on the appeal as set out in paragraph 99; indeed they commend it. But they complain that he never properly resolved it. More particularly they contend that he was not entitled to reach the conclusion set out in paragraph 101 to the general effect that in so far as there is and will arise any acute demand for additional first class hotel accommodation in the Bristol area, then it will be met by the normal market forces of supply and demand. This complaint really lies at the heart of the applicant's challenge before this court. I propose first to deal with it in all its various forms and then to turn very much more briefly to consider the other residual and largely subsidiary grounds of challenge raised upon this application.

The central complaint is advanced in a variety of different ways. First it is contended that there was no evidence to support the inspector's conclusion that the normal forces of supply and demand would operate to meet on another site the demand for additional hotel facilities. Next it is said that proper account was not taken of a number of matters which had been canvassed strongly by the applicants upon the appeal; this ground of challenge is in large part complementary to the first ground in that it seeks to stress all the evidence before the inspector that went the other way and to assert that had he taken it properly into account he could not have arrived at the conclusion impugned. Thirdly it is said that in considering the main issue which he had identified the inspector failed to ask himself the right question, namely:

> Whether, on the assumption that the appeal site was the only suitable site likely to be developed in the foreseeable future for development of the kind proposed, . . . the planning objections to built development on the site were so great as to warrant keeping it undeveloped despite the need for the development.

Finally, Mr. Horton submits on behalf of the applicants that the inspector misconstrued and misapplied green belt and agricultural land policies in regard to hotel development, criticism which upon analysis also depends for its validity upon the proposition that there was no basis for the inspector to conclude that the need could be met elsewhere, a conclusion implicitly underlying the further conclusions set out in paragraphs 104 and 106 to which I have referred.

What all these differently formulated grounds really amount to is in my judgment a *cri de coeur* to the general effect that the inspector was not entitled to conclude that the accepted need for further hotel accommodation could be met elsewhere than upon the appeal site but rather was bound to determine the appeal upon the assumption that it would be met only if the applicants' appeal were to be allowed. Mr. Horton accepts that the inspector could have said:

> I recognise that the need may well not be met if this appeal is dismissed, but I nevertheless recommend its dismissal because the planning objections are such as to outweigh the need.

But, as Mr. Horton rightly points out, this was not the basis of decision. Rather it was that the need would be met elsewhere.

The applicants advance two wholly distinct arguments as to why the inspector was not entitled to arrive at this crucial conclusion. First they say that as a matter of law the inspector was debarred from deciding that the accepted need could be satisfied on some unspecified alternative site. Secondly, even if that first contention be wrong, they contend that there was no evidence in the instant case upon which the inspector could properly have arrived at this conclusion.

So far as the first of those contentions goes, Mr. Horton submits that once the inspector rejected the four specific sites canvassed by the district council as ones upon which the accepted need could be met he was bound to ignore the possibility of the need being met elsewhere. Instead, says Mr. Horton, he was bound to assume that there was no alternative site upon which it could be met.

There has been a growing body of case law upon the question when it is necessary or at least permissible to have regard to the possibility of meeting a recognised need elsewhere than upon the appeal site. The line of authority begins with *Rhodes* v. *Minister of Housing and Local Government and Another* and ends with a spate of cases reported in *Journal of Planning and Environment Law* in 1986. These authorities in my judgment establish the following principles:

(1) Land (irrespective of whether it is owned by the applicant for planning permission) may be developed in any way which is acceptable for planning purposes. The fact that other land exists (whether or not in the applicant's ownership) upon which the development would be yet more acceptable for planning purposes would not justify the refusal of planning permission upon the application site.

(2) Where, however, there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere. This is particularly so when the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it.

(3) Instances of this type of case are developments, whether of national or regional importance, such as airports (see the *Rhodes* case), coalmining, petro-chemical plants, nuclear power stations and gypsy encampments (see *Ynstawe, Ynysforgan and Glais Gypsy Site Action Group* v. *Secretary of State for Wales and West Glamorgan County Council.*) Oliver L.J.'s judgment in *Greater London Council* v. *Secretary of State for the Environment and London Docklands Development Corporation and Cablecross Projects Ltd.* suggests a helpful although expressly

not exhaustive approach to the problem of determining whether consideration of the alternative sites is material[1]:

> . . . comparability is appropriate generally to cases having the following characteristics: First of all, the presence of a clear public convenience, or advantage, in the proposal under consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or to some section of the public in the proposal; thirdly, the existence of an alternative site for the same project which would not have those effects, or would not have them to the same extent; and fourthly, a situation in which there can only be one permission granted for such development, or at least only a very limited number of permissions.

(4) In contrast to the situations envisaged above are cases where development permission is being sought for dwelling houses, offices (see the *GLC* case itself) and superstores (at least in the circumstances of *R.* v. *Carlisle City Council and the Secretary of State for the Environment, ex parte Cumbrian Co-operative Society Ltd.*).

(5) There may be cases where, even although they contain the characteristics referred to above, nevertheless it could properly be regarded as unnecessary to go into questions of comparability. This would be so particularly if the environmental impact was relatively slight and the planning objections were not especially strong: See *Sir Brandon Meredith Rhys Williams* v. *Secretary of State for Wales and others* and *Vale of Glamorgan Borough Council* v. *Secretary of State for Wales and Sir Brandon Rhys-Williams,* both of which concerned the siting of the same sewage treatment works.

(6) Compulsory purchase cases are *a fortiori* to planning cases: in considering whether to make or confirm a C.P.O. it is plainly material to consider the availability of other sites upon which the need could be satisfied, particularly where an available alternative site is owned by the acquiring authority itself—see *Brown and another* v. *Secretary of State for the Environment and Another.*

The applicants accept that the question whether or not specific alternative sites need to be identified before any question of meeting the perceived need elsewhere can arise has not yet expressly fallen for decision. They contend, however, that it is implicit in the authorities that where it was held to be right to consider alternative sites these were specific alternatives. Mr. Horton suggests that it is necessary to operate on a site specific basis since (a) the rationale of the comparability exercise is to consider whether the alternative has fewer disadvantages than the appeal site and this cannot satisfactorily be achieved unless the comparison is between specific sites and (b) it is unfair to place upon the developer the burden of establishing not merely that certain specified alternative sites cannot meet the need but also that no other sites elsewhere can. The decided cases clearly establish that a planning authority is not obliged to "rout round" to see if there may not be an

[1] (1986) 52 P. & C.R. 158 at p.172.

alternative site (*Rhodes'* case); Mr. Horton, however, goes further and says that a planning authority is not even entitled to take that course.

Mr. Holgate for the Secretary of State likewise accepts that the earlier cases do not decide the point now at issue. He contends, however, that there can be no objection in principle to a planning authority concluding in certain cases at least that a particular need can be satisfied elsewhere than upon the appeal site even though no other specific sites are identified and established as preferable alternatives. I prefer Mr. Holgate's contention. In my judgment the better view is as follows:

(1) In a case where planning objections are sought to be overcome by reference to need, the greater those objections, the more material will be the possibility of meeting that need elsewhere.

(2) Although generally speaking it is desirable and preferable that a planning authority (including, of course, the Secretary of State on appeal) should identify and consider that possibility by reference to specifically identifiable alternative sites, it will not always be essential or indeed necessarily appropriate to do so.

(3) The clearer it is that the planning objections relate essentially to the development of the application site itself rather than to some intrinsically offensive aspect of the proposed development wherever it might be sited, the less likely it is to be essential to identify specific alternative sites.

(4) Equally, the less specific and exacting are the requirements to be satisfied in order to meet the accepted need, the more likely is it that a planning authority could reasonably conclude that such need can be met elsewhere without reference to some identifiable preferable alternative site.

(5) Clearly, it is more difficult to make a sensible comparison in the absence of an identified alternative site and it is likely that a planning authority would be more hesitant in concluding that an accepted need could be met elsewhere if no specific alternative sites have been identified, *a fortiori* if they have been carefully searched for, identified and rejected.

(6) The extent to which it will be for the developer to establish the need for his proposed development on the application or appeal site rather than for an objector to establish that such need can and should be met elsewhere will vary. However, in cases such as this, when the green belt planning policy expressly provides that "the need for a motel on the site proposed, not merely in the area generally, has to be established in each case"[2] the burden lies squarely upon the developer. Thus in this type of case it will be the more likely that the planning authority could reasonably conclude that the need can be met elsewhere without reference to some identified more appropriate alternative site.

(7) As a matter of law it is accordingly open to a planning authority to conclude on the facts that an accepted need can and should be met elsewhere than upon the application or appeal site without reference to any specific alternative site or sites.

[2] Paragraph 16 of Development Control Policy Note 12.

I turn to the applicants' alternative contention that there was no evidence here upon which the inspector could found a factual conclusion that the accepted need would be met elsewhere. What Mr. Horton says is that in paragraph 101 the inspector was either adumbrating what he conceived to be an economic truth (or imperative or axiom of natural law: all these terms were at various times used in argument) but which in fact was manifest nonsense, or alternatively was expressing a belief which not merely had no factual support but indeed flew in the face of all the evidence put before him. He cites the case of *Banks Horticultural Products Ltd.* v. *Secretary of State for the Environment* which he contends provides a close analogy with the present case. The planning issues there, he suggests, had been whether there existed other reasonable sources of supply of peat; the issue here was whether a site for hotel development to meet the demand would be produced by the market forces of supply and demand.

Mr. Holgate for the Secretary of State submitted that when a conclusion is founded to a substantial degree upon questions of judgment and opinion it is more difficult to challenge it upon the ground that there is no evidence to support it than where, as in *Banks Horticultural,* the conclusion is as to an existing state of affairs. He nevertheless accepts that in principle it is as a matter of law amenable to such challenge. But he cites *Wholesale Mail Order Supplies Ltd.* v. *Secretary of State for the Environment and Another* and *Westminster Renslade Limited* v. *Secretary of State for the Environment and the London Borough of Hounslow* as indicating the considerable extent to which an inspector properly can and indeed must exercise his own planning judgment even in the absence of personal expertise in pertinent fields.

I have concluded that the decision is not to be faulted on the basis Mr. Horton propounds. As it seems to me paragraph 101 is a perfectly proper expression of view. To the extent that it predicates the existence of certain facts; such as that there are hoteliers other than these applicants who would have an interest in meeting the need and that the responsible planning authority do indeed desire to encourage the construction of additional hotel facilities; there was evidence before him to such effect; in so far as it expresses an opinion or judgment on the likely future course of events, it was well within the proper scope of the inspector's powers to form such a conclusion. Mr. Horton contended that the need could only be met if in future there occurred a remarkable coincidence of factors which had not thus far coincided despite the existence of a present need and a desire on all sides to meet it. These factors were, he said, the need itself, an available site, the satisfaction of the four criteria contained in finding of fact xiii, a willingness on the part of the planning authorities to grant planning permission, and a hotelier with funds to undertake the development. So be it (subject to a qualification as to the four criteria to which I shall come shortly). It is ultimately a matter of judgment as to whether such a situation would indeed arise.

It is I think helpful to the determination of this legal challenge to set out my understanding of the inspector's decision overall. It is to this essential effect:

(1) He accepts that there is a clear need for additional good class hotel accommodation in the Bristol area.
(2) He accepts that the appeal site is the prime site for such development.
(3) He accepts that these applicants will not build a hotel in the Bristol area otherwise than upon the appeal site.
(4) He does not, however, accept that no other hotelier will build; rather he believes that sooner or later (and, inferentially, the more acute the need the sooner) in one way or another the need will be met.
(5) He recognises that the need may be met by some development quite different in location and nature to that proposed by the applicants, whether upon a site already contemplated for hotel development or not.
(6) In the result he concludes that the present need is capable of being met otherwise and elsewhere than by the proposed development upon the appeal site and is not to be regarded as so acute as to overcome the strong planning objections constituted by the appeal site being in the green belt and of high agricultural quality.

The qualification to be made to Mr. Horton's point that all four of his client's criteria will need to be satisfied is this. Those criteria are only essential to a hotel of the Post House type. That is not in fact the only type of development which could satisfy the identified need. Quite apart from that, moreover, it must be recognised that there is in any event some measure of elasticity within each of the criteria. Certainly they were not accepted by the inspector as absolute. Indeed, the inspector's reference to the success of the applicants' own Alveston Post House hotel plainly indicates his refusal to accept that the criteria were sacrosanct even in regard to that type of development. Mr. Holgate pointed to several passages in the main body of the inspector's report which contained at least some partial recognition even by the applicants that other forms of hotel development might occur to satisfy the need. I instance just two: Paragraph 17 records the applicants' contention that other hotels "probably would not be suitable to meet the identified needs" (the recognition of a contrary possibility is implicit); paragraph 18 identifies two other known hotel developments in the offing.

In my judgment it is important to bear in mind that the identified and accepted need is of a wholly unspecific character. It is of good hotel accommodation in the Bristol area generally. True, it would seem likely to arise most acutely in north Bristol, but it could clearly be satisfied within a very substantial general area. Equally important, there are no planning objections to a hotel development as such, rather, as I have related, the planning authorities would clearly encourage such development if on the right site. All the planning objections here relate rather to the application site itself. Thus this seems to me to be just such a case as could properly attract the refusal of planning permission on the footing that the need can and should be met elsewhere than upon the appeal site, albeit no other specific more appropriate alternative is at present identified.

I turn to deal very much more shortly with the applicants' other grounds of challenge. In my judgment none are made out. In considering them it must be recognised that this was a long and careful decision letter. It is not to be construed like a statute or a contract nor to be too readily criticised for venial imperfections. Approached on this basis I am at the end of the day wholly unpersuaded by the reasons challenge which was advanced with regard to certain identified findings of fact and more generally in respect of the inspector's conclusions upon the central matters to which I have already fully referred. In regard to the specific findings of fact complained of, Mr. Horton contends that the inspector did not make sufficiently plain whether he was accepting, or was merely recording, certain aspects of the applicants' case. Although at first blush there seemed to me some substance in this criticism, I have finally reached the conclusion that almost invariably it is plain which of these two things the inspector was doing and, even when rarely it is not, it really does not greatly matter. For instance, finding of fact xvii appears to me to be saying that the inspector accepts that the applicants would need to attract the tourist trade in order that their proposed type of development would be viable. However, in rejecting their case that the need should be satisfied in this way the inspector seems to me to have considered that it might well be necessary for another type of development to attract the tourist trade in order to be viable. It is not I think necessary to deal individually with all the other passages complained of by Mr. Horton.

A separate ground of complaint related to paragraph 103. It was said that the inspector here failed to distinguish between

> the effect of an out-of-town site on product cost on the one hand and on the provision of the product itself upon the other hand.

I am bound to say I did at one stage regard that paragraph as troublingly enigmatic but I have finally reached the view that really the inspector was saying here no more than that the question of costs, even if they determined the viability of the applicant's own proposal, could not override other planning objections. His comment that that was accepted by the appellants was a reference back to paragraph 31 of the report.

In so far as Mr. Horton additionally complained that the inspector had failed to take proper account of the importance to the economy of the area of providing additional hotel accommodation and had failed to compare that economic need with the competing need to safeguard good agricultural land and had failed also to recognise the availability of a great deal of good agricultural land compared to the few available suitable hotel development sites, I need say no more than that there is in my judgment nothing in the inspector's report to indicate that he omitted to take account of these considerations. Rather, the very fact that he recorded the arguments so very fully and accurately (and it is noteworthy that there is no complaint about the first 22 pages of his report in which he sets out the evidence and the respective cases) indicates that he had all these considerations well in mind. It was certainly not incumbent upon him to deal specifically with all the points in his final conclusions.

I am conscious myself of having neglected to deal with quite all of Mr. Horton's many arguments, but I have endeavoured to deal with all the

main points as I have understood them and certainly with those grounds which in my view would, if made good, have required the quashing of the Secretary of State's decision. For the reasons I have given, however, these grounds do not succeed and the application therefore must be dismissed.

Application dismissed.

Solicitors—Paisner & Co.; the Treasury Solicitor, London.

DERBYSHIRE DALES DC v SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Queen's Bench Division (Administrative Court)

Carnwath L.J.: July 17, 2009[1]

[2009] EWHC 1729 (Admin); [2010] 1 P. & C.R. 19

Alternative sites; Material considerations; Planning permission; Renewable energy; Wind turbines

H1 *Planning Permission—Material Considerations—Alternative Sites—Targets for Renewable Energy Generation*

H2 The second defendant (Carsington) applied to the first claimant (the Council) for planning permission for the erection of four wind turbine generators, substation, access track and ancillary equipment. The Council refused the application. Carsington appealed and an inspector was appointed to determine the appeal. He allowed the appeal and granted planning permission subject to conditions. The Council, supported by the Peak District National Park Authority, challenged the decision under s.288 of the Town and Country Planning Act 1990 (the 1990 Act). The inspector's decision letter identified a number of main issues, including: (a) whether as a matter of law and policy, there was a requirement to consider alternative sites for the proposal, and if so, whether that process had been adequately pursued and alternatives had been convincingly discounted, in all cases bearing in mind the aims of national and local policies (the alternatives sites issue); (b) the contribution that the proposals would make to achieving regional and national targets for renewable energy generation, bearing in mind extant and emerging national planning policy, and the extent to which any such contribution should be weighed against any adverse impacts in terms of the other issues (the strategic targets issue).

H3 The inspector rejected the argument that it was necessary to consider possible alternative sites. He stated that, on the evidence, he was not persuaded that the appeal proposal was one of the narrow range of cases where alternatives had to be considered as a matter of law; nor that there was any requirement in relevant planning policy to do so. He considered that the nature of any adverse impacts that the proposal would have was such that a decision could properly be made on the merits of the case, balancing any such impacts against other considerations. On the strategic targets issue the Inspector rejected the Council's argument (based on a sentence in a recent policy statement, *Planning and Climate Change: Supplement to Planning Policy Statement 1*) that renewable energy targets were immaterial to the determination of an individual planning application, and found the appeal proposal would make a valuable contribution to achieving regional and national

[1] Paragraph numbers in this judgment are as assigned by the court.

targets for renewable energy generation, bearing in mind extant and emerging national policies. He stated that an approach which sought to keep individual planning applications and regional targets entirely separate would be irrational not only in terms of the government's aims of securing substantially more renewable energy generation capacity but also of the whole basis of the plan-led system.

H4 The claimants submitted (a) that the inspector made a fundamental error in holding that it was not necessary as a matter of law or policy to consider whether the need on which Carsington relied could be met on some other site which caused less harm to development plan policy. By way of authority the claimants relied principally on the judgment of Sullivan J. in *R. (on the application of Bovale Ltd) v Secretary of State for Communities and Local Government* [2008] EWHC 2538 (Admin); (b) that the inspector had misinterpreted the relevant policy that renewable energy targets were immaterial to the determination of an individual planning application.

H5 **Held, dismissing the application,**

H6 (1) It was one thing to say that consideration of a possible alternative site was a potentially relevant issue, so that a decision-maker did not err in law if he had regard to it. It was quite another to say that it was necessarily relevant, so that the decision-maker erred in law if he failed to have regard to it. In *Bovale*, not only did Sullivan J. make it clear that he was not laying down any general rule, but the issue before him was not the same as the present. The question was whether the inspector had erred in law by having regard to alternative sites, not (as here) whether he had erred by failing to do so. The legal analysis of the two propositions was materially different. In the present case, it was impossible to say that there was anything in the statute or the relevant policies which expressly or impliedly required the inspector to consider alternatives, particularly as none had been identified. The emphasis of s.78 of the 1990 Act was on consideration of the particular application in question. The statutory provisions and policies relating to the National Park and Conservation Areas required special regard to be paid to their protection, but they fell short of imposing a positive obligation to consider alternatives which might not have the same effects. That was left as a matter of planning judgment on the facts of any case. That was how the inspector had approached it, and he was entitled in law to do so.

H7 (2) With regard to the strategic targets issue, the interpretation of policy was a matter for the inspector within the bounds of reasonableness. The inspector had grappled with the Council's submissions and had adopted what he regarded as a rational reconciliation of the apparent conflicts in the policy statements. There was no legal objection to that approach.

H8 **Cases referred to:**

(1) *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223; [1947] 2 All E.R. 680; (1947) 63 T.L.R. 623 CA

(2) *Bolton MBC v Secretary of State for the Environment* (1991) 61 P. & C.R. 343; [1991] J.P.L. 241; [1990] E.G. 106 (C.S.) CA (Civ Div)

(3) *Creed NZ v Governor General* [1981] 1 N.Z.L.R. 172

(4) *Greater London Council v Secretary of State for the Environment* (1986) 52 P. & C.R. 158; [1986] J.P.L. 193 CA (Civ Div)

(5) *R. v Secretary of State for Transport Ex p. Richmond upon Thames LBC (No.1)* [1994] 1 W.L.R. 74; [1994] 1 All E.R. 96 QBD

(6) *R. (on the application of Bovale Ltd) v Secretary of State for Communities and Local Government* [2008] EWHC 2538 (Admin)
(7) *R. (on the application of National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154
(8) *Findlay, Re*
(9) *Rhodes v Minister of Housing and Local Government* [1963] 1 W.L.R. 208; [1963] 1 All E.R. 300; (1963) 127 J.P. 179
(10) *Secretary of State for the Environment v Edwards (PG)* (1995) 69 P. & C.R. 607; [1994] 1 P.L.R. 62 CA (Civ Div)
(11) *Stringer v Minister of Housing and Local Government* [1970] 1 W.L.R. 1281; [1971] 1 All E.R. 65; (1971) 22 P. & C.R. 255 QBD
(12) *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759; [1995] 2 All E.R. 636; (1995) 70 P. & C.R. 184 HL
(13) *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1987) 53 P. & C.R. 293; [1986] 2 E.G.L.R. 185; (1986) 279 E.G. 680 QBD

H9 **Legislation referred to:**
(1) Environment Act 1995
(2) Planning and Compulsory Purchase Act 2004
(3) Town and Country Planning Act 1990

H10 **Claim** by the claimants, Derbyshire Dales DC and Peak District National Park Authority, under s.288 of the Town and Country Planning Act 1990 against the decision of an inspector appointed by the first defendant, the Secretary of State for Communities and Local Government to allow an appeal by the second defendant, Carsington Wind Energy Ltd, against the refusal of planning permission. The facts are as stated in the judgment of Carnwath L.J.

H11 *Anthony Crean Q.C.*, instructed by Head of Law, Peak District National Park Authority, for the claimants.
David Forsdick, instructed by Treasury Solicitors, for the first defendant.
Jeremy Pike, instructed by Bond Pearce LLP, for the second defendant.

JUDGMENT

CARNWATH L.J.:

Background

1 By a planning application, dated January 24, 2007, the second defendant (Carsington) applied to the first claimant (the Council) for planning permission for development described as "[e]rection of 4 no. wind turbine generators, substation, access tracks and ancillary equipment".

2 By a notice dated July 20, 2007 the Council, as local planning authority, refused the Planning Application. Carsington appealed and an Inspector (Mr Robin Brooks, BA, MRTPI) was appointed to determine the appeal on behalf of the Secretary of State. In July 2008 the inspector held a public local inquiry and undertook site visits. By a decision-letter dated September 27, 2008, he allowed the appeal and granted planning permission subject to conditions. The Council, supported by the

Peak District National Park Authority, challenges that decision under s.288 of the 1990 Act.

3 The decision letter identified five main issues that the inspector had to resolve (DL24):

> "• a. The impact of the proposal on the character and appearance of the surrounding landscape including the Peak National Park and its setting; and, in the latter respect whether approval would unacceptably harm the status of the National Park and undermine the objectives of its designation;
> • b. The impact of the proposal on the settings of the Carsington and Hopton, and Brassington Conservation Areas and whether approval would preserve or enhance the character or appearance of those Conservation Areas;
> • c. The effects of the proposal upon enjoyment of the countryside by members of the public, including those using the High Peak Trail, the Limestone Way and local paths, and those visiting Carsington Water; and whether approval would have significant adverse effects on the contribution made by tourism and recreation to the local economy;
> • d. Whether as a matter of law and policy, there is a requirement to consider alternative sites for the proposal; and if so, whether that process has been adequately pursued and alternatives have been convincingly discounted; in all cases bearing in mind the aims of local and national planning policies;
> • e. The contribution that the proposals would make to achieving regional and national targets for renewable energy generation, bearing in mind extant and emerging national planning policy; and the extent to which any such contribution should be weighed against any adverse impacts in terms of the other issues."

4 The Inspector's treatment of these issues is meticulous and impressively comprehensive. The grounds of challenge are limited to his treatment of issues (iv) and (v). I shall refer to the issues respectively as "the alternative sites issue", and "the strategic targets issue". It is unnecessary therefore to review his reasoning in detail. It is sufficient to refer to the findings relevant to those issues.

5 There is no criticism of the Inspector's summary of the policy context in which the application had to be considered. He noted the statutory duty under ss.61 and 62 of the Environment Act 1995 "to have regard to the National Park purposes" in exercising functions "in relation to, or so as to affect, land in a National Park"; and corresponding policies in the Regional Spatial Strategy (RSS) and local plan, which (in his words):

> "… reflect the importance of safeguarding both the National Park and its setting. And in the case of the Peak Park protection of the setting is arguably of particular importance given the way in which it is surrounded by industrial towns and cities of no great distance from its boundary, and subject to particular development pressures …" (DL33).

6 He found that there would be some harm to the National Park and its setting viewed from the northwest (DL59), and a "significant" but "limited" impact on the setting of the Carsington and Hopton Conservation Area (DL64). However any

such harm "must be weighed in the balance" against "other aspects or benefits of the proposal", (DL59, 68).

7 He rejected the argument that it was necessary to consider possible alternative sites. Having reviewed the authorities on the relevance of alternative sites, and the detailed submissions of counsel, he said:

> "84 … on the evidence I am not persuaded that the appeal proposal is one of the narrow range of cases (as agreed by both main parties) where alternatives should be considered as a matter of law; nor that there is any requirement in relevant planning policy to do so. In any case I consider that the nature of any adverse impacts that the proposal would have is such that a decision can properly be made on the merits of the case, balancing any such impacts against other considerations. Accordingly it is unnecessary to consider further the second part of the issue as framed, namely whether the process of considering alternatives has been adequately pursued and alternatives have been convincingly discounted."

8 On the fifth issue, he rejected the Council's argument that renewable energy targets were immaterial to the determination of an individual planning application, and found instead that:

> "… that the appeal proposal would make a valuable contribution to achieving regional and national targets for renewable energy generation, bearing in mind extant and emerging national planning policy" (DL94).

9 His overall conclusion was:

> "120. As I have noted above, the appeal proposal conflicts with development plan policy in some respects, relating to impact on the setting of the National Park, on landscape elsewhere and on the setting of two Conservation Areas. However, as I have also noted, those conflicts are limited in nature and extent and in my view they are outweighed by the benefits of the renewable energy that would be supplied. That contribution would be modest in relation to targets set in extant and emerging regional policy, and Government targets and expectations, but it would be by no means trivial; and it is only by a succession of such individual proposals, of varying scales, that targets can be achieved. Although the RSS target for onshore wind generation is largely achieved, it is an indicative measure and only limited progress has been made towards overall regional targets. Targets in the emerging Regional Plan are even more challenging. On balance I have come to the conclusion that the considerations in favour of the development outweigh those contrary to it and that planning permission should be granted."

10 Against that background I turn to the two grounds of challenge.

The alternative sites issue

The argument

11 As I have said, the Inspector rejected the argument that it was necessary to consider possible alternative sites.

12 Mr Crean, for the authorities, points to the Inspector's clear finding that the proposal conflicted in some respects with the development plan. He submits that

the Inspector made a "fundamental error" in holding that it was not necessary as a matter of law or policy to consider whether the need on which Carsington relied could be met on some other site which caused less harm to development plan policy.

13 By way of authority, he relied principally on the judgment of Sullivan J. in *R. (on the application of Bovale Ltd) v Secretary of State for Communities and Local Government* [2008] EWHC 2538 (Admin), handed down a few weeks after the Inspector's decision. I shall need to look at that judgment in more detail. However, before doing so it is necessary to set it in context of the earlier cases on this issue.

Alternative sites—the law

14 The cases reveal a long-running debate among planning lawyers (going back at least to *Rhodes v Minister of Housing and Local Government* [1963] 1 W.L.R. 208; [1963] 1 All E.R. 300; (1963) 127 J.P. 179) as to the relevance of alternative sites to the consideration of individual planning applications. There have been numerous examples of attempts to overturn decisions on the grounds that the decision-maker has refused permission on one site by reference to the merits of another; or alternatively has granted permission without regard to the merits of another. There has also been some debate as to how far, if alternative sites are deemed relevant at all, it is necessary for those relying on the argument to identify specific alternatives.

15 It is not surprising that such challenges have generally failed. Common sense suggests that alternatives may or may not be relevant depending on the nature and circumstances of the project, including its public importance and the degree of the planning objections to any proposed site. The evaluation of such factors will normally be a matter of planning judgment for the decision-maker, involving no issue of law.

16 A useful starting-point is the judgment of Simon Brown J. (as he then was) in *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1987) 53 P. & C.R. 293; [1986] 2 E.G.L.R. 185; (1986) 279 E.G. 680 QBD, where he sought to summarise the effect of the cases:

> "There has been a growing body of case law upon the question when it is **necessary or at least permissible** to have regard to the possibility of meeting a recognised need elsewhere than upon the appeal site … These authorities in my judgment establish the following principles:
>
> (1) Land (irrespective of whether it is owned by the applicant for planning permission) may be developed in any way which is acceptable for planning purposes. The fact that other land exists (whether or not in the applicant's ownership) upon which the development would be yet more acceptable for planning purposes would not justify the refusal of planning permission upon the application site.
>
> (2) Where, however, there are clear planning objections to development upon a particular site then **it may well be relevant and indeed necessary** to consider whether there is a more appropriate alternative site elsewhere. This is particularly so when the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it.

(3) Instances of this type of case are developments, whether of national or regional importance, such as airports … coal mining, petro-chemical plants, nuclear power stations and gypsy encampments … Oliver LJ's judgment in *Greater London Council v Secretary of State for the Environment [52 P&CR 158]* suggests a helpful though expressly not exhaustive approach to the problem of determining whether consideration of the alternative sites is material …

> 'comparability is appropriate generally to cases having the following characteristics: first of all, the presence of a clear public convenience, or advantage, in the proposal under consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or to some section of the public in the proposal; thirdly, the existence of an alternative site for the same project which would not have those effects, or would not have them to the same extent; and fourthly, a situation in which there can only be one permission granted for such development or at least only a very limited number of permissions.'

(4) In contrast to the situations envisaged above are cases where development permission is being sought for dwelling houses, offices … and superstores …

(5) There may be cases where, even although they contain the characteristics referred to above, nevertheless it could properly be regarded as unnecessary to go into questions of comparability. This would be so particularly if the environmental impact was relatively slight and the planning objections were not especially strong …." (Emphasis added.)

17 I have highlighted the words "relevant or at least permissible" and "relevant and indeed necessary", because they signal an important distinction, insufficiently recognised in some of the submissions before me. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it.

18 For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant planning issues is very wide (*Stringer v Minister of Housing and Local Government* [1970] 1 W.L.R. 1281; [1971] 1 All E.R. 65; (1971) 22 P. & C.R. 255 QBD); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759; [1995] 2 All E.R. 636; (1995) 70 P. & C.R. 184 HL at 780). On the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so.

19 Of the many cases referred to in argument before me, the only one in which an error of the latter kind was found by the courts was *Secretary of State for the Environment v Edwards (PG)* (1995) 69 P. & C.R. 607; [1994] 1 P.L.R. 62 CA (Civ Div). The facts illustrate the special circumstances which are necessary to support such an argument. The Department of Transport had accepted the need for a motor service-station on each side of the A47 trunk road. Mr Edwards owned

one of a number of competing sites, all of which were subject to planning applications. Following refusals by the local planning authority, appeals by Mr Edwards and another developer (RDL) came before the Secretary of State. The Secretary of State, having refused Mr Edwards request for the cases to be considered together at a joint public inquiry, granted permission on the RDL sites. Mr Edwards challenged the grant of permission, and his challenge succeeded in the High Court and the Court of Appeal.

20 In the leading judgment, Roch L.J. referred to the familiar requirement (under s.78 of the 1990 Act) to have regard to "the development plan …, and to any other material considerations". Having noted the judgment of Simon Brown J. in the Trust House Forte case, he referred to the four criteria proposed by Oliver L.J. in the *GLC* case, which he found to be satisfied. He also referred (at 614) to the judgment of Glidewell L.J. in *Bolton MBC v Secretary of State for the Environment* (1991) 61 P. & C.R. 343; [1991] J.P.L. 241; [1990] E.G. 106 (C.S.) CA (Civ Div) at 352, as setting out "the principles by which the question whether a relevant consideration was material should be judged". He quoted two passages of that judgment:

> "The decision maker ought to take into account a matter which might cause him to reach a different conclusion from that which he would reach if he did not take it into account.
> If the judge concludes that the matter was fundamental to the decisions, or that it is clear that there is a real possibility that the consideration of the matter would have made a difference to the decision, he is thus enabled to hold that the decision is not validly made."

21 Roch L.J. concluded (at 616):

> "Crucial in this case, in my judgment, was the fact that there were not merely alternative sites, but those sites had been the subject of planning applications and were, in the case of three other applicants, the subject of appeals to the Secretary of State. These other sites were material planning considerations in the circumstances of this case, account of which would have created a real possibility that the Inspector's decisions in the RDL appeal would have been different."

22 Although on the facts the decision is not at all surprising, it is helpful to look behind the reasoning to identify more clearly the nature of the legal error. Given that there was an acknowledged need for only two sites, that several competing sites were before the Secretary of State, but that there were clear planning objections to them all, it seems odd that the Secretary of State declined to adopt the obvious means of enabling the selection to be made on a comparative basis. It was arguably "irrational" or "*Wednesbury* unreasonable" for him not to do so. However, that was not how the case seems to have been presented or decided. Instead it was put as a failure to have regard to "material considerations", contrary to s.78. It is noteworthy that the Court regarded it as "crucial" that alternative sites had not only been identified, but were before the Secretary of State on appeal. The case does not bind me to reach the same conclusion in a case where no alternatives have been identified, and it is simply the possibility of such sites which is said to be material.

23 The principles by which a matter is to be deemed "material" or "relevant" as a matter of law have not been consistently stated in the cases or the textbooks. The

passages from the *Bolton MBC* judgment, cited by Roch L.J., might suggest a relatively low threshold. It would be enough for the court to decide for itself that consideration of some factor (for example, in this case, the possibility of less harmful alternative sites) "might realistically" have led to a different result. However, that approach is not supported by the textbooks, nor, in my respectful view, by other authorities.

24 There is a useful discussion in *De Smith's Judicial Review*, 6th edn, (London: Sweet & Maxwell), paras 5-110-9. In *Bolton MBC* (in which the factual context was unusual and quite different from the present), Glidewell L.J.'s main purpose was to rebut an argument by Mr Sullivan QC that failure to have regard to a matter could only invalidate a decision if it was one which "no reasonable Secretary of State would have failed to take into account" (p.351). A judicial statement to similar effect by Laws J., in relation to considerations not specified in the statute (*R. v Secretary of State for Transport Ex p. Richmond upon Thames LBC (No.1)* [1994] 1 W.L.R. 74; [1994] 1 All E.R. 96 QBD at 95), is criticised in *De Smith's Judicial Review* as ignoring the fact that:

> "… the (non-specified) considerations adopted by the decision-maker may be matters that are extraneous to the purpose of the statute, and therefore reviewable for illegality" (para.5-115).

25 *De Smith's Judicial Review* refers to an important statement of principle by Cook J. in the New Zealand Court of Appeal, in *Creed NZ v Governor General* [1981] 1 N.Z.L.R. 172 at 182. That was one of the cases cited by Glidewell L.J. in *Bolton MBC*, but without reference to the fact that the statement had been adopted by the House of Lords in *Findlay, Re* . As *De Smith's Judicial Review* points out (para.5-116), it has also been followed more recently by the Court of Appeal in *R. (on the application of National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154.

26 Cook J. took as a starting point the words of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223; [1947] 2 All E.R. 680; (1947) 63 T.L.R. 623 CA at 228:

> "If, in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters."

He continued:

> "What has to be emphasised is that it is only when the statute *expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation* that the court holds a decision invalid on the ground now invoked. It is not enough that it is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision …." (Emphasis added.)

27 In approving this passage, Lord Scarman noted that Cook J. had also recognised, that:

> "… in certain circumstances there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers … would not be in accordance with the intention of the Act" (*Findlay, Re* at 334).

28 It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because "obviously material") requires to be taken into account "as a matter of legal obligation".

Bovale

29 Against that background I return to the judgment of Sullivan J., on which Mr Crean principally relies. In that case the inspector had refused permission for the development of what was called a "total care village". Two issues related to possible conflicts with the development plan: first, whether the land should be retained for its allocated employment use; secondly, whether in accordance with the plan the proposal should make provision for affordable housing. The inspector found against the applicants on both points. He accepted that there was a need for facilities such as those proposed; but he found no evidence that this was the only site in Hereford suitable for the purpose, and conversely the Council had pointed to three sites, allocated for residential use, which might be suitable. The decision was challenged on the grounds that:

> "The existence or non-existence of an alternative site to accommodate the Claimant's proposal was an immaterial consideration at this Inquiry as a matter of law."

30 Sullivan J. referred to some of the earlier cases, including Trust House Forte, but noted that they had preceded the enactment in 2001 of s.54A of the 1990 Act (s.38(6) of the 2004 Act), introducing the so-called "the plan led system". Applications had now to be determined in accordance with the development plan, unless material considerations indicated otherwise. Accordingly, said the judge ([26]):

> "… since the Inspector had concluded that the proposed development would conflict with the policies in the development plan … he was required by statute to dismiss the appeal unless he concluded that what were said by the Claimant to be the advantages of the proposal outweighed those objections."

31 Noting that the material consideration relied on by the applicant to overcome the objection had been the need for such a facility within the Hereford area, the judge commented:

> "In deciding what weight to attribute to that need, it was, as a matter of common sense, relevant for the Inspector to consider whether the need for certain facilities in Hereford could be met only on the appeal site or whether it might be met on other sites in Hereford …." ([27])

32 He referred to the summary of the principles in Trust House Forte, in which Simon Brown J. had highlighted cases where there were "clear planning objections to the development on a particular site", and had said:

> "In a case where planning objections are sought to be overcome by reference to need, the greater those objections, the more material will be the possibility of meeting that need elsewhere."

Sullivan J. commented:

> "Under the plan led system there can be no doubt that conflict with the development plan is capable of amounting to a "clear planning objection." ([29])

Having emphasised that he was not seeking to lay down any general principle, and that "each case will turn on its own particular facts", he concluded:

> "However, in the present case, where the Claimant was contending that there was a need within a particular geographical area, Hereford, which outweighed the development plan objection to the use of this site for the proposed development, it was plainly relevant to consider whether there were other sites within Hereford on which the need might be met." ([30])

33 In the light of that judgment, Mr Crean submits, the Inspector in the present case should have adopted the following process of reasoning:

> "(i) that the proposals conflicted with relevant policies in the Development Plan;
> (ii) that the conflict with the Development Plan policies which seek to protect the National Park from harm was of national significance and are therefore a consideration of the utmost importance;
> (iii) that section 38(6) of the Planning and Compensation Act 2004 imposed a statutory duty to refuse the appeal unless material considerations indicated otherwise;
> (iv) that the appellant had cited need for renewable energy in Derbyshire as such a consideration, and that, therefore;
> (v) an investigation should be made as to whether that need might be met elsewhere without giving rise to such conflict."

34 Since the inspector had failed to conduct such an investigation, his decision was erroneous in law.

Discussion

35 I am unable to accept Mr Crean's submission, or his interpretation of *Bovale*. Not only did Sullivan J. make clear that he was not laying down any general rule, but the issue before him was not the same as the present. The question was whether the Inspector had erred in law by having regard to alternative sites, not (as here) whether he had erred by failing to do so. As I have explained, the legal analysis of the two propositions is materially different. Furthermore the need relied on was for a particular facility in a defined area, in circumstances where the authority had identified three other potential sites.

36 Returning to the present case, it seems to me impossible to say that there is anything in the statute or the relevant policies which expressly or impliedly required the Inspector to consider alternatives, particularly as none had been identified. The emphasis of s.78 is on consideration of the particular application in question. The statutory provisions and policies relating to the National Park and Conservation

Areas required special regard to be paid to their protection, but they fell short of imposing a positive obligation to consider alternatives which might not have the same effects. That is left as a matter of planning judgment on the facts of any case.

37 I accept that, if there had been specific national or local policy guidance requiring consideration of alternatives, failure to have regard to it might provide grounds for intervention by the court. However, Mr Crean was unable to point to any such requirement. For example, Planning Policy Statement 22 on "Renewable Energy", which sets out "key principles" for planning authorities (para.1) makes no such reference. Mr Crean pointed to principle (viii), which requires proposals to demonstrate how environmental and social impacts "have been minimised through careful consideration of location, scale, design and other measures". I accept that the reference to "careful consideration of location" may be said to imply a need for the developer to be able to demonstrate the particular merits of the selected site. But it is far from requiring the decision-maker in every case to review potential alternatives as a matter of obligation. It is left as matter of planning judgment on the facts of the case. That is how the Inspector approached it, and he was entitled in law to do so.

The strategic targets issue

38 The Inspector noted the importance that national policy attached to encouraging renewable energy generation, made clear in particular in PPS22 and other more recent statements of policy. He noted also that the Council accepted "the thrust of this policy", as a matter to be balanced against any harm the appeal proposal might cause. The Statement of Common Ground between the parties had acknowledged that the renewable energy output from the proposal should be given "significant weight" in determining the planning application (DL85).

39 However, the Council had argued that targets set out in the RSS were not relevant to individual planning applications. This submission was based on a sentence in a recent policy statement, "Planning and Climate Change: Supplement to Planning Policy Statement 1". Under the heading "Managing performance", para.16 reads:

> "Strategic targets, including any developed for cutting carbon dioxide emissions, and trajectories used to identify trends in performance form part of the framework for planning decisions provided by the RSS. They should be used as a strategic tool for shaping policies and contributing to the annual monitoring and reporting expected of regional planning bodies. They should not be applied directly to individual planning applications …."

40 The inspector was unimpressed by this argument. He said:

> "88. My interpretation of para 16 of the PPS Supplement is that it proscribes assessing individual proposals directly by reference to regional targets, perhaps in the sense that a planning application should necessarily be refused because a particular target has been met, or allowed because there is a shortfall against a target. RSS policies, including Policy 41 of the extant RSS and Policy 39 of the draft Regional Plan, on renewable and low carbon energy respectively, are aimed at those preparing development plans rather than those assessing planning applications. However, it seems to me that regional targets, and the extent to which they have been or might be achieved, must be a relevant

consideration when considering individual proposals simply because it is only through an accumulation of those individual proposals that any target will be achieved.

89. An approach which sought to keep individual planning applications and regional targets entirely separate would be irrational not only in terms of the Government's aim of securing substantially more renewable energy generation capacity but also of the whole basis of the plan-led system …."

41 Mr Crean challenges the Inspector's interpretation, which he says ignores the clear words of para.16. He acknowledges that this might appear to conflict with PPS22, but points to the introduction to the Supplement which indicates that, in case of conflict with other policy statements, PPS1 is to prevail.

42 I confess, with respect, to some difficulty in understanding Mr Crean's position on this point. He accepts that the interpretation of policy is a matter for the Inspector, within the bounds of reasonableness. He also accepts that his own interpretation of the policy produces a surprising, even irrational result. It also appears to have been common ground that there is a shortfall of renewable energy sources judged by reference to regional targets, and also that the renewable energy output from this development had to be given significant weight in the planning judgment. The Inspector grappled with his submission based on para.16, and understandably adopted what he regarded as a rational reconciliation of the apparent conflicts in the policy statements. I cannot see any legal objection to that approach.

Conclusion

43 For these reasons, I find no error of law in the Inspector's reasoning. The application must accordingly be dismissed.

44 I understand that it is accepted that in these circumstances the authorities must pay the Secretary of State's costs, and that there should be no order in relation to Carsington's costs. If not agreed, any issues as to the form of assessment (summary or detailed), and if summary as to their amount, should be made in writing within one week of the handing-down of this judgment, with three days thereafter for any reply.

Reporter—Janet Briscoe

R. (on the application of SCOTT JONES (BY HIS LITIGATION FRIEND VICKY JONES) AND THOMAS HOWE (BY HIS LITIGATION FRIEND LYNN HOWE)) V. NORTH WARWICKSHIRE BOROUGH COUNCIL

COURT OF APPEAL

[2001] EWCA Civ. 315; [2001] P.L.C.R. 31[1]

(Aldous and Laws L.JJ. and Blackburne J.): March 1, 2001

H1 *Planning permission—development of open space owned by Council—judicial review—whether alternative site a material consideration—general approach*

H2 The claimants were two children who lived within 10 metres of an area of open land known as "The Green", at Tamworth in Staffordshire, which was owned by the defendant. According to the development plan, development of the site was in principle acceptable.

H3 In September 1999 the defendant's housing services committee selected the site for the construction of eight bungalows intended as affordable housing for elderly people. A planning application for the bungalows was made. Another site had previously been selected for the development, which was also owned by the defendant, but that proposal had been abandoned.

H4 The mother of the first claimant submitted written representations to the determining committee, suggesting that the second site would be more suitable for the development. The committee, when granting the application, appeared to take the view that they were not entitled to consider the second site.

H5 At first instance, the judge, His Honour Judge Rich Q.C. (sitting as a Deputy High Court Judge), quashed the grant of planning permission on the ground that it had been open to the defendant to consider the alternative site and it should have decided whether to do so. The defendant appealed.

H6 **Held:** allowing the appeal:

[1] Paragraph numbers in this judgment are as assigned by the court.

H7 1. The decision of the judge was to be upheld unless no reasonable planning authority could have considered the alternative site relevant on the facts of this case.

H8 2. As a general proposition, the consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally, such circumstances would particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question. That was not this case on these particular facts and no reasonable council could have treated the site as relevant.

H9 **Cases referred to:**

- *CREEDNZ Inc. v. Governor-General* [1981] 1 N.Z.L.R. 172.
- *In re Findlay* [1985] A.C. 319.
- *Rhodes v. Minister of Housing and Local Government* [1963] 1 W.L.R. 208.
- *Trusthouse Forte Hotels Ltd v. Secretary of State for the Environment* (1986) 53 P. & C.R. 293.
- *Vale of Glamorgan Borough Council v. Secretary of State for Wales and Sir Brandon Rhys-Williams* [1986] J.P.L. 198.

H10 *Timothy Jones* for the appellant.
Timothy Corner for the respondents.

1 **ALDOUS L.J.:** I will ask Laws L.J. to give the first judgment.

2 **LAWS L.J.:** Before us there are two appeals arising out of a judgment given by H.H. Judge Rich Q.C. sitting as a deputy judge of the Queen's Bench on September 19, 2000. The judge acceded to the claimants' application for an order of certiorari to quash the grant of a planning permission by the respondent council, but declined to order the council to pay their costs.

3 Simon Brown L.J. granted permission to appeal in respect of the judge's substantive decision on November 28, 2000, and on January 23, 2001 granted permission to appeal to the claimants in respect of the decision on costs.

4 As of this moment we have only heard argument upon the first appeal and I now give my judgment upon it.

5 The application site for the purposes of the relevant planning permission is known as The Green, Kingsbury at Tamworth in Staffordshire. It is open land said to be about the size of a football pitch, or possibly a modest football pitch, and it belongs to the council. It was not subject to any

designation in the development plan. As the judge noted, the development plan included it in an area where development was in principle acceptable and there was no policy against it.

6 The claimants are two children who regularly play on the site. They live within 10 metres of the site. They brought these proceedings via their mothers as litigation friend in each case. It is said that local children have played on the site for many years and about 30 do so as at the present time.

7 On September 6, 1999 the council's Housing Services Committee selected this site as apt for the construction of eight two-bedroom bungalows intended as affordable housing for elderly persons to be built by the Waterloo Housing Association. On October 5, 1999 that association applied for planning permission to erect the bungalows and to demolish four existing bungalows which adjoined The Green. The association had previously had in mind to carry out this bungalow development on a different site also owned by the council. That was a car park area at Coventry Road, Kingsbury. The council had looked at this site and others before its committee selected the application site as apt for the development.

8 As I understand it, because of objections raised by local residents in relation to the Coventry Road site the housing association did not carry forward the proposal to build there to the point of seeking planning permission.

9 On October 13, 1999 the council wrote to local residents (including the claimants' mothers) indicating that the application had been received, attaching a plan and inviting representations in time for the Planning and Development Committee's meeting, then scheduled for November 9, 1999 when the planning officer would report the application, and preferably before August 29, 1999.

10 The council wrote again to residents on November 2, 1999 indicating that the application would in fact be reported to the committee on December 7, 1999 and stating:

> "You may attend but will not be able to speak."

11 Accordingly one of the claimants' mothers, Miss Jones, made written representations in a letter dated December 7, 1999 which she faxed to the council on that day. At the end of her letter she said this:

> "Whilst I would agree there is a need for this type of dwelling, I feel that the plan originally proposed, building on Coventry Road, was far more suitable, not just for those reasons already outlined, but the Coventry Road site is near to the doctors, the chemists, the shops, the bus stop, etc. I also understand that the

> local resident objection was far less than has been demonstrated for The Green.
>
> In all, I feel there is a strong argument to deny this planning permission and for the Council to once again look at the Coventry Road site."

12 This letter was before the committee on December 7, 1999. They had a report from the chief planning officer which recommended the grant of permission provided there were no objections from the highway authority that could not be covered by condition. There was no mention in the report of any possibility that the development could be carried out at the Coventry Road site or any other site.

13 Miss Jones attended the meeting on December 7, 1999 and made a note of the proceedings. As I understand it the accuracy of her note is not challenged, although of course it is not put forward as a complete record. It contains this short passage:

> "One Councillor then said, although he knew he should not bring [it] up, that there had been another site considered, but because of a number of objections from that site, the Committee had gone for another site, which is why this site (The Green) had been chosen. The Chairman agreed that it should not have been introduced into this meeting."

14 The reference there must be to the subject-matter of the alternative site which is plainly Coventry Road.

15 The claimants rely on this material as apparently indicating that the Committee's view was that they were not entitled to consider the Coventry Road site in the course of their deliberations upon the application. Mr Jones, for the council, appearing before us today accepts that it is right to proceed on the basis that the committee took the view that they were disabled from or not entitled to consider the Coventry Road site.

16 At length the committee resolved in accordance with the planning officer's report and on December 22, 1999 the full council granted planning permission subject to conditions. That was the subject of the judicial review before H.H. Judge Rich. Permission to seek judicial review had been granted by Elias J. on May 22, 2000 after an oral hearing.

17 The claimants' case is put in two ways, as it was in the court below. First, it is said that the availability of the other site at Coventry Road was a material consideration which the council were obliged to take into account. In the alternative it is said that the council should at least have considered whether to take it into account; that is, it was a mistake of law on their part to go on the basis that they were not entitled at all to have regard to it.

18 I shall start where the judge started, with the relevant provisions of the governing statute. The judge introduced them thus:

> "9. By section 70 of the Town and Country Planning Act of 1990 the local planning authority in dealing with an application for planning permission:
>
> '... shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.'
>
> 10. Thus if there is a material consideration which the planning authority fails to have regard to it has failed to comply with that duty in determining the planning application. That section is itself to be construed by the application of section 54(A) of the Act which provides:
>
> 'that where in making any determination under the planning acts regard is to be had to the development plan, a determination should be made in accordance with the plan unless material considerations indicate otherwise.'"

19 The judge then considered a number of authorities to which I must shortly return. He concluded (paragraphs 29 and 30) that it had been open to the council to consider the alternative site and they should have decided whether to do so. They were in error in proceeding on the footing that they were bound to disregard it. That was the basis upon which he ordered certiorari to go to quash the permission.

20 The general law as regards the duty of a public decision-maker to take relevant considerations into account is well-known.

> (1) If the operative statute provides a lexicon of relevant considerations to which attention is to be paid, then obviously the decision-maker must follow the lexicon.
>
> (2) If however the statute provides no such lexicon, or at least no exhaustive lexicon, then the decision-maker must decide for himself what he will take into account. In doing so he must obviously be guided by the policy and objects of the governing statute, but his decision as to what he will consider and what he will not consider is itself only to be reviewed on the conventional *Wednesbury* principle: see the judgment of the New Zealand Court of Appeal in *CREEDNZ Inc. v. Governor-General* [1981] 1 N.Z.L.R. 172, approved by Lord Scarman for the purposes of the law of England in *Re Findlay* [1985] A.C. 319, HL.

21 It follows in my judgment that H.H. Judge Rich's decision must be upheld unless no reasonable planning authority could have considered the alternative site relevant on the facts of this case.

22 As I foreshadowed a number of authorities have been cited, of which the latest in time is the decision of Simon Brown J. (as he then was) in *Trusthouse Forte Hotels Ltd v. Secretary of State for the Environment* (1986) 53 P. & C.R. 293. The learned judge there had regard to earlier authority and said this:

> "These authorities in my judgment establish the following principles:
>
> (1) Land (irrespective of whether it is owned by the applicant for planning permission) may be developed in any way which is acceptable for planning purposes. The fact that other land exists (whether or not in the applicant's ownership) upon which the development would be yet more acceptable for planning purposes would not justify the refusal of planning permission upon the application site.
>
> (2) Where, however, there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere. This is particularly so when the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it.
>
> (3) Instances of this type of case are developments, whether of national or regional importance, such as airports . . . coalmining, petro-chemical plants, nuclear power stations and gypsy encampments . . ."

23 There is then reference in parenthesis to authority. The learned judge continues:

> "Oliver LJ's judgment in Greater London Council v. Secretary of State for the Environment and London Docklands Development Corporation and Cablecross Projects Ltd suggests a helpful although expressly not exhaustive approach to the problem of determining whether consideration of the alternative sites is material:
>
> . . . comparability is appropriate generally to cases having the following characteristics: First of all, the presence of a clear public convenience, or advantage, in the proposal under consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or to some section of the public in the proposal; thirdly, the existence of an alternative site for the same project

> which would not have those effects, or would not have them to the same extent; and fourthly, a situation in which there can only be one permission granted for such development, or at least only a very limited number of permissions."

24 Then number (4) in Simon Brown J.'s judgment:

> "(4) In contrast to the situations envisaged above are cases where development permission is being sought for dwelling houses, offices (see the *GLC* case itself) and superstores (at least in the circumstances of *R. v. Carlisle City Council and the Secretary of State for the Environment, ex parte Cumbrian Co-operative Society Ltd*).
>
> (5) There may be cases where, even although they contain the characteristics referred to above, nevertheless it could properly be regarded as unnecessary to go into questions of comparability. This would be so particularly if the environmental impact was relatively slight and the planning objections were not especially strong . . ."

and examples concerning sewage treatment works are given.

25 I omit number (6) which concerns compulsory purchase cases.

26 With great deference this is a very useful summary, and it is unnecessary to delve very much further into the other cases. Simon Brown J. incorporated what had been said by Oliver L.J. in the *GLC* case.

27 I note by way of emphasis only the observation of Paull J. in *Rhodes v. Minister of Housing and Local Government* [1963] 1 W.L.R. 208 at 212, where he said:

> "In my judgment whether on a planning application the Minister (or the local authority) has to take into consideration whether an alternative site is available must depend upon the nature of the application. I agree that, for instance, in the case of an application in respect of the building of a dwelling-house upon a certain plot of land it would be absurd to expect the authority or the Minister to consider whether there are alternative plots upon which that house can be built: that could not be a material consideration. On the other hand, in the case of an application such as the present one it seems to me that if, for instance, an objector could show that within a few miles of the land in question there was another site equal in all respects to the site in question and where it would be unnecessary to disturb anyone and where no one would be within hearing distance, that fact would clearly be a material consideration."

28 I should add that the case there concerned an application to develop a municipal airport.

29 I will content myself lastly with referring only to the comment of Woolf J. (as he then was) in *Vale of Glamorgan B.C. v. Secretary of State for Wales and Sir Brandon Rhys-Williams* [1986] J.P.L. 198 at 199:

> "It must be borne in mind in considering this question that the starting point was that an owner of land was entitled to use land for any purpose which was acceptable for planning purposes. The fact that he had other land which might be very acceptable for planning purposes for the same use did not mean that that other land had to be used in preference to the land which he wished to use for a particular purpose. The same applied where land was owned by other persons. The fact that a particular landowner wanted to develop his land in a particular way should not be frustrated because there was other land owned by someone else which would be more suitable in planning terms for that particular use. If of course a particular site was of questionable appropriateness, then it might be relevant to consider whether there was a more appropriate site which could be used for that development."

30 If I may say so, with respect, it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking—and I lay down no fixed rule, any more than did Oliver L.J. or Simon Brown J.—such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question.

31 In my judgment that is not this case. But even if the potentially available site at Coventry Road was not a *necessary* planning consideration, might a reasonable local planning authority nevertheless have regarded it as a *possible* planning consideration and so should have taken it into account?

32 For my part I do not think so. There were not here clear planning objections (to use Simon Brown J.'s language). In context the learned judge in that case by those words was I think referring to substantial objections which were on the facts made out. Here there were of course objections, otherwise plainly we would not be here at all. There had been objections in relation to Coventry Road as well. If the council, as the judge held, were obliged to consider whether to have regard to the alternative site, that can only have been on the basis that that factor might have prevailed so as to persuade the council to refuse planning permission. But in my judgment it was simply not capable of amounting to a good reason for refusing

planning permission on the site in question here. Objections put forward against a planning application such as this are of course judged on their merits. If they outweigh the planning benefits of the development applied for, the application will be refused. To introduce into that equation a consideration of a different character, namely whether there would be less disbenefits on another site, could only be justified for some special reason such, as I have said, as the existence of particularly serious detriments to the public in a case where nevertheless there is a pressing need for the development. As I have said that does not apply here. I note moreover that the learned judge himself held (paragraphs 19 and 20) that this case did not fall within Oliver L.J.'s second and fourth categories.

33 It follows in my judgment that no reasonable council could have treated the Coventry Road site as relevant. In those circumstances it matters not that the council thought they were obliged not to consider it. If they had considered it, they would have been bound to reject it.

34 I would for my part therefore allow the appeal.

35 **BLACKBURNE J.:** I agree.

36 **ALDOUS L.J.:** I also agree.

H11 *Solicitors*—Legal Services, North Warwickshire Borough Council; Public Interest Lawyers, Birmingham.

H12 *Reporter*—Matthew Reed.

COMMENTARY

C1 In the course of his judgment (with which the other Lord Justices agreed) Laws L.J. stated that the general proposition that could be drawn from the authorities on alternative sites as material considerations was:

> "consideration of alternative sites would only be relevant in the most exceptional circumstances."

C2 It is submitted that this proposition goes against the present flow of environmental law. One of the important factors in an environmental impact assessment is whether there has been an assessment of whether there are alternative sites on which the project could take place. Thus the environmental statement must now contain an outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice, taking into account the environmental effects; see regulation 21 of the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 that implemented the amendments made to the 1985 Directive by the 1997 Directive. Even today environmen-

tal impact assessments are not an everyday occurrence but it would seem wrong to regard them as most exceptional.

C3 The New Zealand decision of *CREEDNZ v. Governor-General* [1981] 1 N.Z.L.R. 172 created the rather strange concept of the consideration which it will not be unlawful for the decision-maker to take into account but which the decision-maker does not necessarily *have* to take into account. The significance being that in the present case, if the council had positively considered whether the merits of the alternative site were relevant, this decision could only have been challenged if it was irrational. In the present case the council had proceeded on the basis that they were bound to disregard the other site. This is why Laws L.J. stated that H.H. Judge Rich's decision would have to be upheld unless no reasonable planning authority could have considered that the alternative site was relevant on the facts of the case. This judgment therefore creates three possible categories of alternative sites. First, sites which are a necessary planning consideration as they clearly come within the tests laid down by the authorities; the development has conspicuous adverse effects but equally it is needed in the public interest and only a few grants of permission will be made. Secondly, sites which it would not be unlawful for the authority to consider but which it would be lawful to decide not to consider. Thirdly, sites, as in the present circumstances, where no reasonable planning authority could have considered it to be a material consideration. While it is clear that the site fell outside the first category, it is more debatable whether the site came within the second category as a possible material consideration. There could be seen to be clear planning objections; the loss of open land that was being used for recreational purposes. Further it would seem that in the case of the alternative site the same planning objections would not apply, as its present use was a car park. What is not very clear from the judgment is why the committee were advised that they were not entitled to consider the alternative. If they had positively determined that the site was not material in the circumstances that decision would have been very difficult to overturn. Laws L.J. would appear to be holding that the committee had been advised that they could not even consider if the Coventry site was material.

C4 *Commentary by*—Michael Purdue.

R. (ON THE APPLICATION OF LANGLEY PARK SCHOOL FOR GIRLS GOVERNING BODY) v BROMLEY LBC

COURT OF APPEAL

The Chancellor of the High Court, Moore-Bick and Sullivan L.JJ.: July 31, 2009[1]

[2009] EWCA Civ 734; [2010] 1 P. & C.R. 10

LT Alternative sites; Amenity impact; Development plans; Green wedge; Material considerations; Planning control; Planning permission; Schools; Visual impact

H1 *Application for planning permission—alternative options within the development site—material considerations*

H2 Langley Park School for Boys (''the Boys' School'') was situated on land designated as Metropolitan Open Land (''MOL'') in the Bromley Unitary Development Plan (''UDP''). To the east, also on land designated MOL was Langley Park School for Girls (''the Girls' School''). Following approval from the DfES for a capital project to rebuild the Boys' School, the Frankham Consultancy Group was appointed to carry out a feasibility study (''the Study''). The Study dealt with ''Appraisal of Location Options'', and stated that there were three obvious and viable options (''the Options''). It looked at the advantages and disadvantages of each option, and made a recommendation as to the most suitable location. Despite the differences between the Options, and the stated desire in the Study to ''have least impact on the MOL'', the Study did not assess the relative impacts of the Options on the openness and visual amenity of the MOL. Having considered the Study, the Boys' School chose Option 3. An application for planning permission was made to the respondent in April 2008. The Study was not presented to the members at the meeting in June 2008, but three documents were available, in addition to the application, a Design and Access Statement, an Identity and Context Statement and a Supporting Planning Application Statement (''the Supporting Statement''). The Design and Access Statement stated that the site was designated as an important piece of MOL and described the three siting options. The various factors ''for'' and ''against'' each option were set out in much the same terms as in the Study. The impact of the Options on the MOL was not mentioned. Although the visual impact upon the MOL was mentioned in the Supporting Statement, the references to it were

[1] Paragraph numbers in this judgment are as assigned by the court.

brief. The Supporting Statement gave the impression that Option 3 was the chosen option and did not draw attention to the fact that there had been a change from Option 3 to the application proposal whereby a greater proportion of the open part of the site would be occupied by new buildings. It did not discuss the implications of this change for the openness and visual amenity of the MOL.

H3 The report to the members (''the Report'') accurately summarised the objections of the Girls' School on MOL grounds. It was clear that the Girls' School was objecting to the proposed siting and design on the basis that the new school would be sited on the open part of the site and that the Report did not take into account Option 1, which, with significant modifications, would have a less harmful effect on the openness of the MOL. The Report stated that each planning application had to be treated on its own merits and that the main issues to be considered in this case were whether very special circumstances had been demonstrated to justify inappropriate development in MOL, the impact of the proposal on the openness of MOL and the character of the area, and the impact on the amenities of nearby residential properties and Langley Park School for Girls. Planning permission was granted.

H4 The appellant challenged the planning permission on the ground that the respondent failed to consider the possibility of an alternative scheme on the site, Option 1.

H5 **Held,** allowing the appeal and quashing the planning permission,

H6 (1) Although the Report correctly summarised Policy G2 of the UDP, including the requirement that the openness and visual amenity of the MOL should not be injured by any proposal for development within it, advised members that the impact of the proposal on the openness of the MOL was one of the main issues to be considered, and said that the impact of the amount of built form on the site and the effect of the reconfigured layout should be carefully considered in terms of its impact on the openness of MOL, it did not contain any analysis of that impact. Nor did the Report express any conclusions as to the extent (if any) to which the openness and visual amenity of the MOL would be injured by the proposed development. Recitation of the mantra that each planning application should be considered on its merits was of little assistance to the members in the present case because those merits included the extent to which there was, or was not, compliance with policy G2, and that in turn depended on an assessment of the proposal's impact on the openness of the MOL. The consideration of the pros and cons of the Options in the Supporting Statement did not address the issue that was being raised by the objectors. The brevity of the members' consideration of the impact of the proposed development on the openness and visual amenity of the MOL, and the generality with which their conclusion was expressed, were a reflection of the complete absence of any assessment of this issue in the Report.

H7 (2) This was not an ''alternative site'' case. The respondent was considering a proposal for substantial new buildings on a large site which was partly occupied by existing buildings and partly open land, within the MOL, where the policy in the UDP was that the openness and visual amenity of the MOL should not be injured by any proposal which ''might be visually detrimental by reason of

scale, siting, materials or design''. It was being contended that it would severely injure the openness and visual amenity of the MOL because the new buildings were to be sited on the open part of the application site (point (a), and that the injury to the MOL would be greatly reduced if the layout was revised so that the new buildings were sited largely on the built up, rather than the open part, of the application site (point (b)). There could be no doubt that point (a) was not merely a material, but a highly material consideration. Given the terms of policy G2, point (b) was certainly capable of being a material consideration. The respondent's submission that point (b) would be relevant only in exceptional circumstances overlooked the fact that this was not an ''alternative site'' case. It was being argued by the objectors than an alternative siting within the application site would avoid or reduce the injury to the openness of the MOL in accordance with policy G2. No exceptional circumstances were required in order to justify taking point (b) into consideration. The Report was woefully inadequate. Point (a) was simply sidestepped, and insofar as point (b) was answered at all, it was answered by the mantra ''each planning application must be considered on its merits''. In the present case, because of the policy imperative in the UDP, that proposals within the MOL should not cause injury to its openness and visual amenity, it was for the members to decide whether they should consider point (b) as part of their consideration of the merits of this application.

H8 (3) All other things being equal, the less the injury that would be caused by the application proposal, the less would be the need in terms of policy G2 to consider whether that injury might be reduced by a revised siting of the proposed new buildings within the MOL site. Where there were clear planning objections to the proposed development, e.g. because it would injure the openness and visual amenity of MOL contrary to policy G2, the more likely it was that it would be relevant, and could in some cases, be necessary, to consider whether that objection could be overcome by an alternative proposal. Whether there was a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal, and if so, how far evidence in support of that possibility or lack of it, should have been worked up in detail by the objectors or the applicant for permission, were all matters of planning judgment for the local planning authority. In the present case, members were not asked to make that judgment. They were effectively told at the onset that they could ignore point (b), and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application.

H9 **Cases referred to:**

(1) *R. (on the application of Kilmartin Properties (TW) Ltd) v Tunbridge Wells BC* [2003] EWHC 3137 (Admin); [2004] Env. L.R. 36; (2004) 101(2) L.S.G. 31
(2) *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2004] C.P. Rep. 12; [2004] 2 P. & C.R. 22
(3) *R. (on the application of J (A Child)) v North Warwickshire BC* [2001] EWCA Civ 315; [2001] 2 P.L.R. 59; [2001] P.L.C.R. 31

(4) *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1987) 53 P. & C.R. 293; [1986] 2 E.G.L.R. 185; (1986) 279 E.G. 680 QBD

H10 **Legislation referred to:**

(1) Planning and Compensation Act 2004

H11 **Appeal** by the appellant, the Governing Body of Langley Park School for Girls, against the order dated February 25, 2009 of Wyn Williams J. dismissing the appellant's application for judicial review of a grant of planning permission dated August 5, 2008 by the respondent, the London Borough of Bromley, to the interested party, the Governing Body of Langley Park School for Boys. The facts are as stated in the judgment of Sullivan L.J.

H12 *R. Langham*, instructed by Kingsley Smith Solicitors LLP, for the appellant.
J. Steel Q.C. and *A. Sharland*, instructed by the London Borough of Bromley, for the respondent.
T. Hill Q.C., instructed by Trowers & Hamlins LLP, for the interested party.

JUDGMENT

SULLIVAN L.J.:

Introduction

1 This is an appeal against the Order dated February 25, 2009 of Wyn Williams J. dismissing the appellant's application for judicial review of a grant of planning permission dated August 5, 2008 by the respondent to the Interested Party (''the planning permission'') for the demolition of existing school buildings, the retention and refurbishment of certain existing buildings, and the construction of a new secondary school including provision of a 600 seat enhanced performance space, a new nine-court indoor sports hall, and other facilities at Langley Park School for Boys, Hawksbrook Lane, Beckenham, Kent (''the Boys' School'').

2 The appellant challenged the planning permission on two grounds:

i) the Statement of Reasons for granting planning permission did not reflect the respondent's decision-making process; and
ii) the respondent failed to consider the possibility of an alternative scheme on the site, referred to as ''Option 1''.

3 The hearing before Wyn Williams J. was a ''rolled up'' permission and substantive hearing. Wyn Williams J. refused permission to apply for judicial review on ground i), granted permission on ground ii), but dismissed the claim. Dyson L.J. granted permission to appeal on ground ii), but refused permission to appeal on ground i). The appellant does not renew its application for permission to appeal on ground i).

Factual Background

4 The ''Background and relevant facts'' are set out in some detail in [3]–[22] of the judgment of Wyn Williams J. [2009] EWHC 324 (Admin). The 6.9 ha Boys' School site is designated as Metropolitan Open Land (''MOL'') in the Bromley Unitary Development Plan (''UDP''). To the east, also on land designated as MOL, is Langley Park School for Girls (''the Girls' School'').

5 There is a substantial amount of existing floor space on the Boys' School site. The Report of the Chief Planner to the respondent's Development Control Committee at its meeting on June 17, 2008 (''the Report'') told members that there was a total of 13050sq m existing floor space with a footprint of 9882sq m (including temporary buildings). The plans of the site show that, broadly speaking, the buildings, together with areas of hard standing such as car parks, are located in the south west half of the site. Hawksbrook Lane runs along the southern boundary of this part of the site. The north east half of the site (to the north of the Girls' School) is open land laid out as sports grounds.

6 MOL in Greater London ''serves the same purpose as Green Belt and will be given the same level of protection'' (para.8.19 of the UDP). Policy G2 in the UDP says that:

> ''Within Metropolitan Open Land (MOL) as defined on the Proposals Map, permission will not be given for inappropriate development unless very special circumstances can be demonstrated that clearly outweigh the harm by reason of inappropriateness or any other harm.''

It is common ground that ''any other harm'' would include injury to the openness and visual amenity of the MOL because Policy G2 also states that:

> ''The openness and visual amenity of the MOL shall not be injured by any proposals for development within. . . the MOL which might be visually detrimental by reasons of scale, siting, materials or design.''

7 Following approval from the DfES for the capital project to rebuild the Boys' School under the ''Building Schools for the Future—One School Pathfinder'' initiative, the Frankham Consultancy Group was appointed to carry out a feasibility study. The feasibility study was completed in November 2007 (the ''Study''). Paragraph 3.5 of the Study dealt with ''Appraisal of Location Option''. Having said that it was the desire of both the Boys' School and the local planning authority to have ''least impact on the Metropolitan Open Land'', the Study said that there were ''three obvious and viable options'', looked at the advantages and disadvantages of each option, and made a recommendation as to the most suitable location.

8 The three options, ''Front of School'' (Option 1), ''Rear Field Option'' (Option 2), and ''Middle Site Option'' (Option 3) were illustrated. The illustrations are purely schematic. Option 1 sited the new school aligned on an east-west axis along the Hawksbrook Lane frontage with a shorter north-south leg occupying the site of the existing 6th form block and the tennis courts to its north. In Option 2 the new school was sited on an east-west axis wholly within the playing fields in

the north eastern part of the site. Option 3 sited the new school on a north-south axis in the middle of the site. In this option the southern part of the new school occupied the site of the existing 6th form block, and the tennis courts to its north, and the northern part of the new school occupied the western part of the playing fields. In simple terms, Option 1 very largely avoided building on the open, north-eastern part of the site. In Option 2 the new school effectively occupied the whole of the playing fields, leaving some open land around the perimeter of the new buildings. In Option 3 the new school occupied part of the playing fields.

9 Despite these differences between the Options, and the stated desire to have ''least impact on the MOL'', the feasibility study did not assess their relative impacts on the openness and visual amenity of the MOL. Although para.3.5 of the Study set out a number of factors ''For'' and ''Against'' each Option, these factors did not include the extent to which each Option would have an impact on the MOL. Having considered the Study the Boys' School chose Option 3 ''because the advantages of this Option, unlike the other two Options, clearly outweighed the disadvantages''.

10 The planning application was submitted on April 17, 2008. The Study was not presented to the members at the meeting on June 17, 2008, but three documents were available, in addition to the application and application drawings: a ''Design and Access Statement'' prepared by the Frankham Consultancy, an ''Identity and Context Plan'' prepared by the same firm, and a ''Supporting Planning Application Statement'' (''the Supporting Statement'') prepared by a firm of planning consultants.

11 The Design and Access Statement said that the site was ''designated as an important piece of Metropolitan Open Land'' and described the three siting options. The various factors ''For'' and ''Against'' each option were set out in much the same terms as in the Study. The impact of the options on the MOL was not mentioned. Although Option 3 was the Boys' School's preferred Option, the siting of the proposed buildings in the planning application differed from that shown in Option 3. The Design and Access Statement explained that a desire not to disrupt the school's operations during construction had led to the siting of the new buildings being moved ''northward and slightly eastward''. The ''Site Arrangement'' plan shows that this resulted, in effect, in a siting and layout which was a hybrid between Option 3 and Option 2. Since the new buildings were not merely moved northwards, but were also moved eastwards, they occupied a larger part, more than half, of the existing playing fields. The implications for the MOL of this changed siting were not addressed in either the Design and Access Statement or the Identity and Context Plan, which again described Options 1–3 and their advantages and disadvantages, but did not deal with their impacts on the MOL.

12 The Supporting Statement explained the selection process for the chosen site layout, and clarified ''some of the key issues determining the ultimate selection of the preferred layout/siting option'' (para.8.15). The three Options were briefly described and the arguments ''For'' and ''Against'' were summarised. One of the arguments ''Against'' Option 1 was that:

> ''A four storey building will have a significant visual impact upon the Metropolitan Open Land when viewed from key vantage points.''

The Supporting Statement said that:

> ''Clearly the negative aspects of this option significantly outweigh the advantages.'' (8.17).

13 One of the arguments ''Against'' Option 2 was that it would have a ''significant impact on views of designated Metropolitan Open Land when viewed from vantage points to the east''. An argument ''For'' Option 3 was that:

> ''A centrally located building would help to enhance the perception of the school being set within grounds when viewed from both an easterly and westerly vantage point. This will enhance the perception of openness from a greater variety of vantage points than the existing school, thus promoting the visual objectives of Metropolitan Open Land Policy.''

No adverse impact on MOL was mentioned in the arguments ''Against'' Option 3; and it was said that as a result of the Study it was:

> ''chosen as being the optimum layout solution for the replacement school in educational, operational, environmental and planning terms.'' (8.22).

14 The report then assessed ''the planning considerations based on the chosen scheme option'' (8.23). Before considering that assessment, it will be noted that there had been no assessment of the relative impact of the three Options on the openness and visual amenity of the MOL prior to the adoption of Option 3 as the optimum layout solution; and that although visual impact upon the MOL was mentioned (for the first time, in the Supporting Statement) the references were brief in the extreme and could not sensibly be described as an assessment of the extent to which the openness and visual amenity of the MOL would (or would not) be injured by each siting Option.

15 Paragraph 8.24 of the Supporting Statement said that the site's designation within MOL had had ''a significant constraining influence over the final form of the development''. Paragraph 8.28 said that it was clear:

> ''that any scheme of development within the MOL must seek to minimise any adverse impact on the open character of the MOL through sensitive design and siting. This requirement to minimising (sic) the visual impact of the new school upon the MOL has been a fundamental element in the initial conceptualisation and design of the replacement school''.

The existing and proposed floorspace and footprint were discussed, and it was said that there would be an overall reduction in ''footprint envelope'' which would ''directly contribute to enhancing the openness of the site and this area of designated MOL''. (8.38). Paragraph 8.40 said that:

> ''By locating the new school centrally within the grounds and locating playing pitches at both the western and eastern end of the site, this will help to enhance the setting of the school from either direction. As a consequence the

perception of visual openness, (the principal purpose of MOL designated land), will be enhanced when viewed from adjacent land.''

16 The Supporting Statement said that the ''scale bulk and height of the MOL Development will be appropriate and sympathetic within its' MOL context'' (8.42). The conclusions in paras 8.38, 8.40 and 8.42 were repeated (paras 8.53–8.55) and it was said that:

> ''8.57 On the basis of this before and after comparison of the visual openness of the site it is maintained that the application scheme represents a positive enhancement worthy of planning approval on MOL grounds. This judgment is reached even before considering the additional very special circumstances which apply in this case on the basis of substantial improvement in education facilities for [the Boys' School]. . .''
> ''8.58 It is maintained that the positive visual impact of the new development in comparison to existing ensures broad compliance and promotion of MOL policy objectives. This is achieved due to the sensitive location and design of the proposed new building, a building which actually increases the level of total floorspace provided. Notwithstanding the strength of this planning application on the basis of visual assessment alone, it is strengthened still further by the very special circumstances case which applies on the basis of educational need, as recognised by Ofsted and the Department of Education and Skills.''

17 The Supporting Statement gives the impression that Option 3 was the ''Chosen Scheme Option''. It does not draw attention to the change from Option 3 to the application proposal whereby a greater proportion of the open part of the site would be occupied by new buildings, nor does it discuss the implications of that change for the openness and visual amenity of the MOL, save insofar as it refers to the visual impact of the application proposal.

The Report

18 The Report briefly described the application site and the proposed development, set out the existing and proposed school building footprints and floor areas, said that the application was accompanied by the Supporting Statement, and summarised the key points made in the Supporting Statement. In respect of MOL the key points were:

> ''Metropolitan Open Land (MOL)
> purpose of proposal is to provide a fit for purpose modern replacement school—an increased amount of floorspace will be required.
> there will be no intensification in school activities but proposal will provide the flexibility offered by the enhanced performance space (where peak activities will occur outside school hours).
> void spaces between existing buildings do not contribute to openness of MOL and existing school is a sprawl.
> proposed school building is coordinated and uses land efficiently.

siting of school building will enhance MOL benefits from certain vantage points.
proposed built form will be appropriate in this setting and in MOL context.
proposed sports and recreation facilities will provide student and community benefits.
enhanced performance facility is ancillary to Class D1 educational use but is also suitable for wider community use.
envelope of built form reduced therefore visual openness of the site is enhanced.
there is a demonstrable educational need.''

19 The report referred to the Design and Access Statement and said that it and the Supporting Statement:

> ''detailed various advantages and disadvantages relating to three options. The advantages and disadvantages of the chosen option are considered as follows. . .''

The arguments ''For'' and ''Against'' Option 3 in the Supporting Statement were then summarised as ''Advantages'' and ''Disadvantages'' respectively.

20 The Report summarised the responses to public consultation. Nearby residents' representations included, in respect of MOL:

- ''Loss of large area of open, green space''
- ''Alternative options would better preserve openness of MOL'', and
- ''Replacement school on site of existing buildings would be preferable''.

The objection from the Girls' School was said to include the following (among many other) points:

- ''Layout is not best option to maintain openness of MOL and conflicts with development plan''.
- ''Site of existing school will remain brownfield''.
- ''Rebuilding of school on existing site is only option that would accord with PPG2 and PPS1.''

21 The Report accurately summarised the objections of the Girls' School on MOL grounds. The Chair of the Governors had written a lengthy objection letter dated May 22, 2008 and the Headteacher, Ms Sage, was permitted to make a short statement to the meeting. Both the letter and the statement made it clear that the Girls' School was not objecting to the principle of redeveloping the Boys' School, but that it was objecting to the proposed siting and design on the basis that the new school would be sited on the open part of the site, ''in the most prominent and destructive location possible'', and that the Report did not take into account Option 1, which, with ''significant modification'', would have a less harmful effect on the openness of the MOL.

22 Having listed the relevant policies in the UDP, including Policy G2, the Report said:

> ''The application details the process of choosing the location for the proposed school and considers the pros and cons of the various siting options. However, each planning application should be treated on its individual merits.
> The site is designated Metropolitan Open Land and Policy G2 states that permission will not be given for inappropriate development unless very special circumstances can be demonstrated that clearly outweigh the harm by inappropriateness or any other harm. It goes on to state that the openness and visual amenity of the MOL shall not be injured by any proposals for development within or conspicuous from the MOL which might be visually detrimental by reasons of scale, siting, materials or design. A school is by definition inappropriate development in MOL but on the basis that there is an established educational use on the site it can be considered that very special circumstances exist to justify such inappropriate development.''

23 After referring to a number of other matters, the Report said that:

> ''Concerns regarding pre-application consultation are noted. The main issues to be considered in this case are whether very special circumstances have been demonstrated to justify inappropriate development in MOL, the impact of the proposal on the openness of MOL and the character of the area, and the impact on the amenities of nearby residential properties and Langley Park School for Girls.''

24 The Report's ''Conclusions'' said that the proposal for the replacement school was by definition inappropriate development within the MOL. Although the Report had said that the impact of the proposal on the openness of the MOL was one of the main issues to be considered, the conclusion which dealt with that issue merely said that:

> ''The proposal will involve the reconfiguration of built form on the site and the footprint of the proposed school will increase by 1,338m2 whilst the floor area will increase by 3547m2. The impact of the amount of built form on the site and the effect of the reconfigured layout should be carefully considered in terms of its impact on the openness of MOL.''

Having referred to the impact of the proposal on the Girls' School and on nearby residential properties, the Report concluded by saying that:

> ''On balance, the proposal may be considered acceptable.''

25 Although the Report correctly summarised Policy G2, including the requirement that the openness and visual amenity of the MOL shall not be injured by any proposals for development within it; advised members that the impact of the proposal on the openness of the MOL was one of the main issues to be considered; and said that the impact of the amount of built form on the site and the effect of the reconfigured layout should be ''carefully considered in terms of its impact on the openness of MOL''; it did not contain any analysis of that impact.

Nor did the Report express any conclusion as to the extent (if any) to which the openness and visual amenity of the MOL would be injured by the proposed development.

26 The Report's only response to those consultees, including the Girls School, who had contended that alternative options would do less injury to the openness of the MOL would appear to be the advice to members that:

> ''The application details the process of choosing the location for the proposed school and considers the pros and cons of the various siting options. However each planning application should be treated on its individual merits.''

27 Recitation of the mantra—that each planning application should be considered on its merits—could have been of little assistance to members in the present case because those ''merits'' included the extent to which there was, or was not, compliance with Policy G2, and that in turn depended on an assessment of the proposal's impact on the openness of the MOL. The consideration of the pros and cons of the various siting Options in the Supporting Statement did not address the issue that was being raised by the objectors: the relative impact of the different siting Options on the openness of the MOL; nor did it explain the implications for openness of the MOL of the change from Option 3 to the application scheme.

The Reasons for granting permission

28 An ''Informative'' at the end of the decision notice tells the reader that ''This is a summary of the main reasons for this decision as required by law. . . For further details please see the application report. . .'' The ''Summary'' is unusually lengthy and detailed, and in ground i) of its challenge before Wyn Williams J. the appellant contended that it did not accurately represent the members' views. That contention, which was disputed by the respondent, was rejected by Wyn Williams J. It is therefore fair to take the ''Reasons for the grant of Permission'' at face value as accurately representing the members' reasons for granting permission.

29 The first paragraph of the Reasons says that:

> ''Members noted that on behalf of the Langley Park Girls School it was submitted that there was an alternative site for the new school called Option 1. In the opinion of those representing the Girls school there were significant advantages in locating the new buildings there. However the application which is for full planning permission did not contain that option. Members considered it is the acceptability of the application before Committee that had to be determined. Members did not regard that it would be appropriate to defer the application for a new proposal based on Option 1 to be brought before them as the applicant was entitled to have the acceptability or otherwise of its own proposal assessed.''

30 The members considered the application on the basis that it was for inappropriate development in MOL, and said that a balancing exercise was necessary to ascertain whether the harm by reason of inappropriateness (referred to as the ''harm by definition'') and any other harm were overcome by the very special circumstances put forward to justify the proposed development.

31 The members noted that the proposal was for development up to two storeys in height while the existing school buildings varied from one to three storeys in height:

> ''They also noted that while the new school would be located primarily on a part of the site not covered by buildings, other areas of the site, particularly along Hawksbrook Lane would be opened up.''

Having considered the impact of the proposals on the amenities of nearby residents and on the Girls' school, and referred to the members' site visit, the Reasons continued:

> ''Having considered these harms and all other matters raised in representations Members considered that the development would cause some harm to the policies to protect Metropolitan Open Land in that a larger area of the site would be occupied by buildings but that this harm was reduced by some improvements to visual amenity both in terms of the 2 storey nature of the development and the opening up of areas formerly covered by buildings. Any harm to the amenities of local residents or to the Girls School could be addressed by condition.''

32 The Members then considered whether there were any very special circumstances that might provide a justification for the development. They set out the education arguments and the arguments in favour of the enhanced performance space. The Members' conclusion was:

> ''Members considered that the educational arguments were very persuasive and found them to constitute very special circumstances in favour of the proposal. They also considered that the benefits to children and young people in the Borough of the enhanced performance space did provide a very special circumstance to justify including that part of the proposal within the development. When these factors were balanced against impact of the proposal on the openness of MOL with regard to existing and proposed footprints and against any potential for harm to the amenities of nearby residents and the Girls school, Members concluded that these harms were overcome by the very special circumstances shown and that the application should be permitted. It was considered the benefits of the proposal outweighed any harm and very special circumstances had been demonstrated to justify the proposal subject to the conditions recommended by the Acting Chief Planner.''

33 The brevity of the Members' consideration of the impact of the proposed development on the openness and visual amenity of the MOL, and the generality with which their conclusion was expressed—''. . .some harm to the policies to

protect MOL. . .but that this harm was reduced by some improvements to visual amenity''—are perhaps a reflection of the complete absence of any assessment of this issue in the Report. On behalf of the respondent Mr Steel Q.C. accepted that there was no such assessment in the Report, but submitted that it could be inferred that the Report's author agreed with and endorsed the assessment in the Supporting Statement.

34 The Report does not say that, and if the intention had been to endorse the assessment of impact on the MOL, such as it was, in the Supporting Statement, it is surprising that the Report did not advise members that, in terms of visual openness, the application scheme represented ''a positive enhancement'', and had a ''positive visual impact'' (see [16] above). If this proposition had been accepted by the respondent's Chief Planner it would, given the terms of Policy G2, have been a powerful reason for not refusing planning permission by reason of ''other harm''. In any event, the Reasons indicate that the members concluded that there would be ''some harm'' to the MOL, and although they considered that this harm would be ''reduced'', the reasons do not suggest that they believed that there would be a ''positive visual impact''.

The grounds of challenge

35 In its Skeleton Argument for the hearing before Wyn Williams J. the appellant contended that the respondent's failure to consider the possibility of an alternative scheme had been unlawful because:

i) The Report

> ''Did not identify the 'other harm' caused by the application scheme (i.e. the actual impact on openness caused by the proposal) and therefore did not grapple with the central issue—whether the claimed educational benefits meant that the particular impact on openness was inevitable or whether they could be achieved with less harm to the MOL.'' ([41]).

ii) It was put to the respondent by the Girls' School that Option 1 would involve much less ''other'' harm. ([42]).

iii) It was material for the members to consider whether the educational need relied on as the very special circumstances could be met in a less harmful way given, (i) the way in which the application was presented in the Report; and (ii) the Girls' School's objection. ([46]).

iv) The reasons for granting permission asserted that the members had not considered question (iii). ([47]).

v) The fact that there was no application for planning permission for Option 1 before the members did not entitle them to decline to consider question (iii). ([48]).

36 I have set out the terms of the appellant's Skeleton Argument before Wyn Williams J., and in particular step (i) of the appellant's argument, because it was said by Mr Steel during the course of his submissions that prior to the hearing before

this Court, the appellant had not contended that the grant of permission was unlawful because the respondent had failed properly to assess the impact of the proposed development on the openness and visual amenity of the MOL. Unsurprisingly, that was the starting point of the appellant's "Option 1" ground.

Discussion

37 In its Summary Grounds of Resistance to the appellant's Application for Permission to apply for Judicial Review the respondent said that:

> "There is no requirement of law or planning policy that obliges a Council to consider or seek out an alternative site in relation to proposed development in Green Belt/MOL. Applications must be considered on their own merits unless there are exceptional circumstances."

Before Wyn Williams J. the respondent submitted that "Alternative sites or schemes are only potentially a material consideration and then only in exceptional circumstances". In support of that submission two authorities were relied upon: *R. (on the application of J (A Child)) v North Warwickshire BC* [2001] EWCA Civ.315 and *R. (on the application of Kilmartin Properties (TW) Ltd) v Tunbridge Wells BC* [2003] EWHC 3137 (Admin); see [58] and [59] of the judgment of Wyn Williams J.

38 Both the *North Warwickshire* and the *Tunbridge Wells* cases were "alternative site" cases, i.e. the objectors were contending that the need for the development could and should be met on a site other than the application site. This was not an "alternative site" case. The respondent was considering a proposal for substantial new buildings on a large site which was partly occupied by existing buildings and partly open land, within the MOL, where the policy in the UDP was that the openness and visual amenity of the MOL should not be injured by any proposal which "might be visually detrimental by reason of scale, siting, materials or design". (emphasis added).

39 It was being contended by those who were objecting to the proposed development (including the appellant) that:

i) it would severely injure the openness and visual amenity of the MOL because the new buildings were to be sited on the open part of the application site ("Point (a)");
ii) the injury to the MOL would be greatly reduced if the layout was revised so that the new buildings were sited largely on the built-up, rather than the open part, of the application site ("Point (b)").

40 There can be no doubt that Point (a) was not merely a material, but a highly material consideration: one of the "main issues" according to the Report. Given the terms of Policy G2, Point (b) was certainly capable of being a material consideration. The respondent's submission that Point (b) would be relevant "only in exceptional circumstances" overlooks the fact that this was not an "alternative site" case: it was being argued by objectors that an alternative siting within the application site would avoid or reduce the injury to the openness of the

MOL in accordance with Policy G2. No ''exceptional circumstances'' were required in order to justify taking Point (b) into consideration.

41 I readily accept the respondent's submission that whether Point (b) was to be regarded as a material consideration, and if so, what weight should be attributed to it, was a matter for the members to decide. I also accept that the authorities demonstrate that the Court will not interfere with the members' judgment on such an issue save on ''*Wednesbury* grounds''. However, those grounds are not limited to irrationality: the decision taker must direct himself properly in law, take account of relevant, and ignore irrelevant matters.

42 The Report advising the members was woefully inadequate. Point (a) was simply sidestepped: the members were told that the impact of the proposals on the openness of the MOL should be ''carefully considered'', but there was no attempt in the Report to assess that impact, or to express any conclusion, even in the most general terms, as to its extent.

43 Insofar as Point (b) was answered at all, it was answered by the mantra—''each planning application must be considered on its merits''. The statement that the application detailed ''the pros and cons of the various siting options'' would have been of no assistance because there was no assessment of their relative impacts of the options on the MOL, and the information as to their impacts individually was sparse in the extreme. In the present case, because of the policy imperative in the UDP, that proposals within the MOL should not cause injury to its openness and visual amenity, it was for the members to decide whether they should consider Point (b) as part of their consideration of the ''merits'' of this application. Consideration of Point (a)—what, if any, injury to the openness and visual amenity of the MOL would be caused by the application proposal, including the proposed siting of the buildings within the application site would be, if not the first, then at least an important factor in deciding whether Point (b) should be considered.

44 All other things being equal, the less the injury that would be caused by the application proposal, the less would be the need in terms of Policy G2 to consider whether that injury might be reduced by a revised siting of the proposed new buildings within the MOL site. Where there are no clear planning objections to a proposed development alternative proposals (whether for an alternative site, or a different siting within the same site) will normally be irrelevant: see *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ. 1346; [2004] 2 P. & C.R. 405, per Auld L.J. at [33].

45 Where there are clear planning objections to a proposed development, e.g. because it would injure the openness and visual amenity of MOL contrary to Policy G2, the more likely it is that it will be relevant, and may in some cases be necessary, to consider whether that objection could be overcome by an alternative proposal. See *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P. & C.R. 239, per Simon Brown J. (as he then was) at 299:

> ''Where, however there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere.''

46 The *Trusthouse Forte* case was an ''alternative site'' case, but the principle must apply with equal, if not greater, force if the suggested means of overcoming the clear planning objection is not that the development should take place on a different site altogether, but that it should be sited differently within the application site itself.

47 The Report effectively advised the members that they need not consider Point (b) because the application had to be ''considered on its merits''. Despite the terms of Policy G2, no consideration was given to, and members were not asked to consider, whether Point (b) should be considered as part of those ''merits''. The reasons for adopting this approach are not explained in the Report, but it would appear from the respondent's submissions in response to these proceedings ([37] above) that it equated Point (b) with an ''alternative site'' objection, and considered that there were no ''exceptional circumstances'' justifying the consideration of such an objection.

48 The members followed the advice in the Report. The Reasons state that the application, which was for full planning permission, did not contain Option 1, and the members had to consider the acceptability of the application (i.e. to consider the application ''on its merits''). The fact that Option 1 was not included in the Interested Party's planning application was not a sound reason for not considering the objectors' Point (b). It is hardly surprising that the application did not contain an alternative siting option. It would appear that the members took the advice in the Report that ''each application should be considered on its merits'' to mean that since Option 1 was not included in the application, Point (b) could not form part of the ''merits'' which they were required to consider.

49 The Reasons make it clear that it was decided at the outset that Point (b) need not be considered, before any consideration was given by the members to Point (a). That is unsurprising, given the advice in the Report, and the lack of any assessment in the Report of the impact of the application proposals on the openness of the MOL. Even if the members had been minded to consider the extent to which the proposed siting of the buildings would injure the openness of the MOL before deciding whether the extent of that injury might justify consideration of the other issue raised by objectors—that the injury could be avoided or reduced by alternative siting within the application site (Point (b))—they would have found it difficult, if not well-nigh impossible, to reach any meaningful conclusion, given the complete lack of information on Point (a) in the Report.

50 The respondent also submitted in its Skeleton Argument that even if it was under a duty to consider alternative Schemes because of exceptional circumstances ''the only alternative scheme that was raised was so vague and inchoate that it could be disregarded''. *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ1346 was cited as authority for this proposition, and reliance was placed on the judgment of Auld L.J. at [30]–[35]. Auld L.J.'s judgment should not be taken out of context. In that case

the application for planning permission was for a development that was acceptable in planning terms. There was no conflict with policy, and far from there being any other harm Auld J. said that:

> ''if considered on its own [it] would not be harmful in a planning sense and would enhance the Building and the Conservation Area of which it is part.'' ([31]).

Mount Cook had put its alternative design options to the Council, and the latter's response had been:

> ''that they were too vague for proper consideration and advice by its officers though it proffered some 'initial' advice indicating that the proposals were likely to be unacceptable.'' ([8]).

51 Against this background, it was submitted on behalf of Mount Cook that ''an alternative scheme is a material consideration to a decision on an application for planning permission even where, on the facts before the decision-maker, there is no likelihood or real possibility of that alternative scheme eventuating. . .The fact that [alternative schemes] were unlikely to come about went to their weight not their materiality'' ([26]). It is hardly surprising that this submission was rejected. An unlikely possibility that a more acceptable alternative scheme might be devised could not, on any rational basis, be a reason for refusing permission for a scheme to which there was no planning objection.

52 It does not follow that in every case the ''mere'' possibility that an alternative scheme might do less harm must be given no weight. In the *Trusthouse Forte* case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. There is no ''one size fits all'' rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.

53 Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. In the present case the members were not asked to make that judgment. They were effectively told at the onset that they could ignore

Point (b), and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application.

54 On behalf of the Interested Party, Mr Hill Q.C. accepted that alternative schemes may be a material planning consideration, and that the likelihood that they will be a material consideration will increase where there are clear planning objections to a proposal and a need for the development is claimed. Whether an alternative scheme is relevant in any given case:

> ''will depend upon the precise circumstances of the case, as assessed by the local planning authority. There is nothing 'prescriptive' about this approach.'' (para.18 Skeleton).

For the reasons given above, I would accept this submission.

55 In para.19 of his Skeleton Argument, Mr Hill submitted that, inter alia, the following factors were:

> ''likely to have a bearing on the issue of whether alternative [schemes] are relevant in a given case:
>
> i. the nature and degree of the harm arising from the proposal;
> ii. the nature and urgency of the need;
> iii. the scope for alternatives which could sensibly satisfy the need;
> iv. the extent to which the feasibility of such alternatives has been demonstrated (ie the weight which can be attached to them).''

The list does not purport to be an exhaustive one, but it is instructive to apply it to the present case. The members were not advised to consider factor (i) before deciding whether they would treat the suggested alternative siting in Option 1 as relevant, and given the lack of any assessment of harm in the report, they would have been unable to reach an informed conclusion in any event. The members did consider factor (ii), and did not think it appropriate to defer the application for a new proposal based on Option 1 to be brought before them. The members did not consider factors (iii) and (iv): consideration of Option 1 was ruled out because it was not included in the Interested Party's planning application, not because the members considered whether there was any scope for alternative siting, or the extent to which its feasibility had been demonstrated. The fact that Option 1 was not included in the planning application was thought to be a sufficient reason for not considering whether an alternative siting might have less impact on the openness of the MOL.

56 For these reasons, the decision to grant planning permission was seriously flawed. Insofar as the Report dealt with Point (a) it was wholly inadequate; and insofar as it directed the members as to whether Point (b) was potentially relevant it was misleading. It follows that the proper course is to make a Quashing Order in respect of the permission unless there is some good reason why the Court should, in the exercise of its discretion, decline to give the appellant such relief.

Impracticability

57 Both the respondent and the Interested Party submitted that the permission should not be quashed because Option 1 was said to be impracticable. Mr McQuillan, the respondent's Acting Chief Planner, said in his witness statement that Option 1 was ''totally impracticable''. It was merely a siting possibility which had been considered in the Study, and rejected by the Interested Party at a very early stage as ''impracticable''. Mr Steel accepted that this ''impracticability'', submission was relevant only to the exercise of the Court's discretion because it was not the basis on which the respondent had determined the application. The Study had referred to ''three obvious and viable Options''. Although the Supporting Statement said that the ''negative aspects'' of Option 1 ''significantly outweigh its advantages'', and described Option 3 as ''the preferred Option'', it did not go so far as to suggest that Option 1 was impracticable. Nor did the Report to members. It merely referred back to the earlier documents, and said that:

> ''The application details the process of choosing the location for the proposed school and considers the pros and cons of the various siting options.''

58 A note of the meeting of the Development Control Committee on June 17, 2008 records that Councillor Noad, who was the Children and Young Persons portfolio holder and not a member of the Development Control Committee, said that:

> ''Objections that the new building should be on the existing school site are not practicable as the existing school has nowhere to go while the new school is being built.''

However, the Reasons do not indicate that the members of the Development Control Committee endorsed that view, although they did accept that, as one of the educational advantages, the proposal would ''enable the disruption to the school during the redevelopment process to be minimised''.

59 Minimising disruption to the school during the redevelopment process appears to have been the primary factor when the siting Options were being compared. The first of the factors ''Against'' Option 1 in the Supporting Statement was ''Major impact of construction site on existing school operations''. The first of the factors ''For'' Options 2 and 3 was ''Minimal effect on existing school during construction. . .''.

The Design and Access Statement explained that:

> ''One of the most crucial decisions made in the evaluation and feasibility stage regarding the Design for the new school was to ensure minimum disruption to the function and operation of the existing school during construction of the new school facility. This meant that the new construction should be kept away from the physical bounds of the existing school allowing adequate phasing of the development whilst maintaining the education integrity of the school. The new school building will be built in one primary phase so that at handover of this phase the entire school population can be

> moved into the new school at the start of a new term so creating minimum disruption to the teaching curriculum.''

This was the reason why the siting in the application differed from that shown in Option 3:

> ''It was also important to the educational integrity of the proposals and also on economic grounds that the need for temporary teaching facilities be kept to an absolute minimum. The proposed scheme requires no extensive temporary teaching accommodation to be provided during construction.''

60 It is readily understandable that the Interested Party, and perhaps the respondent in its capacity as Local Education Authority, would accord overriding importance to this factor. The respondent was not, however, considering this application for planning permission in its capacity as the Local Education Authority. It was considering the application as the Local Planning Authority, and was under a statutory duty to determine the application in accordance with the Development Plan (in this case the UDP) unless material considerations indicated otherwise: see s.38(6) of the Planning and Compensation Act 2004. As the Local Planning Authority, the respondent's priority in accordance with Policy G2 was to ensure that any injury to the openness and visual amenity of the MOL was, if not avoided, then at least minimised as far as possible.

61 The ''impracticability'' submission is premised on the priority accorded by the Interested Party to the objective of minimising disruption to the existing school. Siting the new buildings on the open part of the site would obviously meet this objective. The objectors were contending that siting the new buildings on the built up part of the site would better meet the policy imperative of not injuring the openness of the MOL. Whether there was a tension between the Interested Party's objective and the policy imperative, and if so how it should be resolved, e.g. by requiring the Boys' School to accept more than ''minimum disruption'' and/or the use of more than the ''absolute minimum'' of temporary teaching accommodation during the construction process, were matters for the respondent to determine as Local Planning Authority. Since the Report did not begin to engage with these issues, it is understandable that the members did not regard them as any part of the ''merits'' of the application which they had to determine. For these reasons I am not persuaded that relief should be refused on the ground of ''impracticability''.

Delay and Prejudice

62 Both the respondent and the Interested Party submitted that relief should be refused because of the appellant's ''undue delay'', or failure to act promptly, and the prejudice caused by that delay/lack of promptness. I do not accept that there was any undue delay or lack of promptness on the appellant's part. The planning permission was issued on August 5, 2008, after the Greater London Assembly and the Secretary of State for Communities and Local Government had decided that they would not intervene or call in the application. The appellant's detailed pre-action protocol letter is dated August 29, 2008. This was well

into the summer holiday period. There was no undue delay in sending the pre-action protocol letter. The respondent's reply is dated September 9. The appellant's Claim Form was filed just over a month later, on October 13, 2008, but the Boys' School was not named or served as an Interested Party. This omission was rectified on October 27, 2008. I do not accept the respondent's contention that there was undue delay in filing the Claim Form. Mr Kingsley Smith in his Witness Statement on behalf of the appellant had to refer to, and exhibit, a large number of relevant documents, many of which it has been necessary to refer to in this judgment.

63 The Interested Party has undoubtedly been prejudiced by these proceedings, but the prejudice has been caused by the mere fact that the permission has been challenged, and not because there was any undue delay or want of promptness in the making of the challenge. Prior to the grant of planning permission, the respondent's Education and Capital Projects Manager wrote to Ms Sage explaining that preparatory work would need to be carried out during the summer holiday. Works were commenced as soon as possible after the grant of permission, and according to the Witness Statement of Mr Ullman, a senior solicitor with the respondent a ''considerable amount of preparatory work'' was carried out between August 5 and August 29 when the appellant sent its pre-action protocol letter. The timetable was so tight that any challenge, however promptly it was made, would be bound to prejudice the Interested Party.

64 I recognise that the challenge to the planning permission has caused significant prejudice to the Interested Party. The main building contract has been put ''on hold'' and has had to be re-tendered. Negotiations (based on the implementation of the existing permission) are expected to conclude in September, which would allow work to commence in November 2009. However, it is almost inevitable that the recipient of a grant of planning permission will be prejudiced if the permission is quashed. In the absence of any undue delay or lack of promptness that is not, in itself, a sufficient reason for the Court to exercise its discretion not to quash the permission.

Conclusion

65 I would therefore allow the appeal and quash the planning permission.

66 **MOORE-BICK L.J.** I agree.

67 **THE CHANCELLOR OF THE HIGH COURT** I also agree.

Reporter—Janet Briscoe

Court of Appeal

Regina (Mount Cook Land Ltd and another) *v* Westminster City Council

[2003] EWCA Civ 1346

2003 May 20, 21;
2003 Oct 14

Auld, Clarke, Jonathan Parker LJJ

Costs — Judicial review — Permission application — Permission to proceed with claim for judicial review refused at oral hearing in which defendant participating — Whether defendant entitled to recover costs of hearing from unsuccessful claimant — CPR r 54.8, Pt 54 Practice Direction, para 8.6

Planning — Planning permission — Application for planning permission — Relevance to application of alternative scheme proposed by another party — Whether existence of alternative scheme material consideration to be taken into account by local planing authority

The local planning authority granted planning permission for the long leaseholder of a commercial building to make external alterations to the building. The claimants, as freeholder, sought judicial review of that decision on the ground that planning permission should have been refused in light of the claimants' own alternative proposal for a scheme of improvements to the building and the surrounding area. The claimants' application for permission to proceed with the claim for judicial review was refused on paper and they renewed the application by way of oral hearing. Having filed an acknowledgement of service pursuant to CPR r 54.8[1], the local planning authority attended the hearing at which the judge refused the renewed application and granted the local planning authority its costs of and incurred by the hearing. The Court of Appeal granted the claimants permission to appeal and to proceed with the claim for judicial review, retaining the claim for its own decision.

On the appeal and the claim—

Held, dismissing the appeal and the claim, (1) that where a development in respect of which planning permission was sought did not conflict with planning policy and otherwise involved no planning harm, any alternative proposals which were not themselves the subject of a planning application at the same time would, in the absence of exceptional circumstances, be irrelevant to the question whether planning permission should be granted; that, even in exceptional circumstances, an alternative proposal could only be a material consideration where there was at least a likelihood or real possibility of the alternative proposal eventuating in the foreseeable future should the planning application be refused; and that, accordingly, since the claimants' alternative proposal was vague and inchoate and had no real likelihood of coming to fruition, the local planning authority had been entitled to disregard it when deciding to grant planning permission (post, paras 30–39, 84, 85).

R (Jones) v North Warwickshire Borough Council [2001] 2 PLR 59, CA applied.

Nottinghamshire County Council v Secretary of State for the Environment, Transport and the Regions [2002] 1 P & CR 30 considered.

(2) That where a claimant had applied for permission to proceed with a claim for judicial review under CPR Pt 54, a defendant who filed an acknowledgement of

[1] CPR r 54.8: "(1) Any person served with the claim form who wishes to take part in the judicial review must file an acknowledgment of service in the relevant practice form in accordance with the following provisions of this rule . . . (4) The acknowledgment of service— (a) must— (i) where the person filing it intends to contest the claim, set out a summary of his grounds for doing so . . ."

CPR Pt 54 Practice Direction, paras 8.5, 8.6: see post, para 52.

A service in response to the claim form in accordance with CPR r 54.8, setting out a summary of his case, and who was then successful in resisting the application for permission, would generally be entitled to recover his costs of filing the acknowledgment of service, at least in a case to which the Pre-Action Protocol for Judicial Review applied and where the defendant had complied with it; that where, however, there had been an oral permission hearing in which the defendant, although not obliged to do so, had chosen to take part, then, in conformity with paragraph 8.6 B of the Practice Direction supplementing CPR Pt 54, the general rule was that the defendant would not, save in exceptional circumstances, be entitled to his costs of and occasioned by doing so; that the court had a broad discretion, with the exercise of which the Court of Appeal should be slow to interfere, in determining whether there were exceptional circumstances justifying an award of costs against an unsuccessful claimant in relation to a permission hearing; that exceptional circumstances might consist in the presence of one or more of (i) the hopelessness of C the claim, (ii) the claimant's persistence in it after being alerted to facts and/or law demonstrating its hopelessness, (iii) the extent to which the claimant had sought to abuse the process of judicial review for collateral ends and (iv) whether, as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant had in effect had the advantage of an early substantive hearing of the claim; that, further, a relevant factor in the exercise of the court's discretion on the grounds of exceptional circumstances might be the extent to which the unsuccessful claimant had substantial resources D which it had used to pursue the unfounded claim and which were available to meet an order for costs; that, in the present case, it was relevant that (i) the claimants' claim was hopeless, (ii) the claimants' intention, as the freeholder of the building, was to use the claim as a means of exerting commercial pressure on the long leaseholder to surrender its lease, and (iii) the claimants had used their considerable resources, effectively, to secure a full hearing of the claim at the application stage; and that, accordingly, the judge had been entitled to find exceptional circumstances for E departing from the general rule and awarding the defendant its costs of the acknowledgment of service and the permission hearing (post, paras 71–79, 84, 85).

In re Leach [2001] CP Rep 97 explained.

Per curiam. An oral hearing of an application for permission to proceed with a claim for judicial review should be a short and relatively inexpensive determination of the arguability of the claim and should not be used as a rehearsal for, or effectively a hearing of, the substantive claim (post, paras 71, 84, 85).

F Decision of Moses J [2002] EWHC 2125 (Admin) affirmed.

The following cases are referred to in the judgment of Auld LJ:

Berkeley v Secretary of State for the Environment [2001] 2 AC 603; [2000] 3 WLR 420; [2000] 3 All ER 897; 81 P & CR 35, HL(E)

Bolton Metropolitan Borough Council v Secretary of State for the Environment [2017] PTSR 1063; (1990) 61 P & CR 343, CA

G *Jolly v Jay* [2002] EWCA Civ 277; The Times, 3 April 2002, CA

Leach, In re [2001] EWHC Admin 455; [2001] CP Rep 97

Impey v Secretary of State for the Environment (1980) 47 P & CR 157

New Forest District Council v Secretary of State for the Environment (1995) 71 P & CR 189

Nottinghamshire County Council v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 293; [2002] 1 P & CR 30

H *R v Honourable Society of the Middle Temple, Ex p Bullock* [1996] ELR 349

R v Secretary of State for Wales, Ex p Rozhon (1993) 91 LGR 667, CA

R (Jones) v North Warwickshire Borough Council [2001] EWCA Civ 315; [2001] 2 PLR 59, CA

Redevco Properties v Mount Cook Land Ltd [2002] NPC 158

Somak Travel Ltd v Secretary of State for the Environment (1987) 55 P & CR 250

South Buckinghamshire District Council v Secretary of State for the Environment, Transport and the Regions [1999] PLCR 72
South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141; [1992] 2 WLR 204; [1992] 1 All ER 573; 90 LGR 201, HL(E)
Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281; [1971] 1 All ER 65; 68 LGR 788
Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1986) 53 P & CR 293

The following additional cases were cited in argument or referred to in the skeleton arguments:

R v Greater London Council, Ex p Blackburn [1976] 1 WLR 550; [1976] 3 All ER 184; 74 LGR 464, CA
R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617; [1981] 2 WLR 722; [1981] 2 All ER 93; 55 TC 133, HL(E)

APPEAL from Moses J and **CLAIM** for judicial review

By a claim form the claimants, Mount Cook Land Ltd and Mount Eden Land Ltd, sought judicial review of the decision of the local planning authority, Westminster City Council, to grant planning permission to the interested party, Redevco Properties, for external alterations to a building at 200–212 Oxford Street, London W1. The claimants' application for permission to proceed with the claim for judicial review was refused on the papers by Ouseley J. On 26 September 1992, following an oral hearing in which the planning authority participated, Moses J refused the claimants' renewed application for permission and awarded the planning authority its costs of the application.

On 27 November 2002 the Court of Appeal granted the claimants permission to appeal and to proceed with their claim for judicial review, retaining the judicial review claim for its own determination. The grounds of claim were that the planning authority should have refused planning permission: (i) in light of the claimants' own alternative proposals for improvements to the building and the surrounding area; and (ii) where the combination of the external alterations, together with proposed internal alterations for which no planning permission was required, would make it more difficult for the local planning authority to resist an application for a change of use that conflicted with the development plan. The ground of the appeal was that the award of costs was contrary to the general rule, under paragraph 8.6 of the Practice Direction—Judicial Review supplementing CPR Pt 54, that where the defendant attended a permission hearing, the court would not generally make an order for costs against the claimant.

The facts are stated in the judgment of Auld J, post, paras 1–17, 40.

John Steel QC, *Robert White* and *Stephen Whale* (instructed by *Stephenson Harwood*) for the claimants.

Timothy Corner QC and *Robert Palmer* (instructed by *Director of Legal and Administrative Services, Westminster City Council*) for the local planning authority.

The court took time for consideration.

A 14 October 2003. The following judgments were handed down.

AULD LJ

1 This is a claim by the appellant ("Mount Cook") for judicial review of the grant by the respondent ("the council") to the interested party, Redevco Properties ("Redevco"), of "operational" planning permission for external alterations to a building (formerly housing the C & A Store) at
B 200–212 Oxford Street, London W1 ("the building"). The matter originally came before the court by way of a renewed, oral, application by Mount Cook for permission to appeal a refusal by Moses J on 26 September 2002 of its renewed application to him for permission to apply for judicial review. On 27 November 2002, this court granted permission to appeal and to claim judicial review and retained the claim for its own decision.

C

The facts

2 The building is within the East Marylebone Conservation Area, as designated by the council, the local planning authority. The statutory development plan for the area is the Westminster Unitary Development Plan adopted by the council in July 1997. The relevant policies are SS2 and
D DES7, the former "to protect retail floorspace in large stores trading on several floors" inside the central zone and the latter "to preserve or enhance the character or appearance of . . . [the council's] conservation areas". It is also within an area for which the local plan policy is to protect department stores, a policy that Mount Cook claims in these proceedings to support.

3 The building fronts onto the north side of Oxford Street and backs onto Market Place, a series of short highways in an "H" formation which,
E until recently, had little attraction for members of the public. As a result of an initiative in the late 1990s known as "the Oxford Market Initiative" by two major local landowners, supported by Mount Cook and the council, parts of Market Place have been improved and made more attractive to the public. However, the improvements did not extend to that part of Market Place immediately to the rear of the building, which remains a rather run-
F down area by the standards of this part of the West End.

4 Mount Cook is the freeholder of the building. Redevco has a 999-year lease of it at an annual rent of £1,139, not expiring until 2912, that is, not for another 910 years. Redevco's interest in the building is thus close to that of a freeholder, a strong position that has clearly exercised Mount Cook, which would like to acquire the leasehold interest to enable it to develop the building for its own purposes. It has substantial property interests to the
G rear and north of the building, all of which, including the building, are known as the Langham Estate, which it manages through a managing agent. In all, the estate comprises over 400 tenancies—some long-term, some short-term—most of which are in commercial uses, mainly retail in the form of shops, restaurants, and offices. Relevantly to Mount Cook's aspirations, some of the leases in respect of buildings close to the rear of the building are
H for terms that will expire in the near future.

5 It is common ground that Mount Cook has sought to bring pressure on Redevco to yield to its development ambitions by reliance on its entitlement under the lease to refuse consent to alterations to the building that Redevco sought to make and by objecting to various applications by Redevco for planning permission. As to the former, Redevco succeeded on

3 December 2002 in obtaining from Mr Paul Morgan QC, sitting as a deputy judge of the Chancery Division, declarations that Mount Cook's refusals of consent were unreasonable and that Redevco was entitled to make the alterations without its consent: see *Redevco Properties v Mount Cook Land Ltd* [2002] NPC 158, paras 19(7) and (10), 38, 40 and 45. On 20 February 2003, this court refused Mount Cook permission to appeal that decision. On the planning front, Mount Cook has objected to at least three planning applications in respect of the building. The first was for change of use of the upper floors from retail to office and residential uses. It was withdrawn, after some revisions, in May 2002. The second, which was made in revised form in February 2002, was to make various alterations. It was granted in May 2002, and is the subject of this appeal. And the third was made in about May 2002, following the withdrawn first application to which it was similar, namely for change of use of some of the upper floors from retail to office or residential use. The council has yet to decide on that application.

6 The planning permission under challenge was for relatively minor physical external alterations involving: the installation of new shop fronts and canopies to the ground floor of each of its three street elevations, including that looking onto the southern part of Market Place; the partial infill of a lightwell; the installation of glass louvres on the second floor and of bronze louvres on the ground floor; and the replacement of black painted windows with clear windows on the first and second floors. The proposed alterations to the Market Street elevation, though relatively minor, would be a distinct enhancement of the character of the building, and of the part of the Market Place onto which it looks.

7 Mount Cook objected to Redevco's application, as it had objected to an earlier form of it, on the grounds that Redevco had not considered how its proposals would preserve or enhance the character and appearance of the conservation area and that some of the alterations might prejudice the future use of the upper floors of the building for retail purposes. In the meantime, in early 2002, Mount Cook had commissioned the production of a number of design options for the improvement of the southern part of Market Place to the immediate rear of the building, with a view to enlivening the area by providing more retail frontages. In March 2002 it put them to the council as a logical extension of the scheme of improvements already achieved by the Oxford Market Initiative in the northern section of Market Place. Its proposals were supported by two other major local landowners, one of which had been jointly responsible for that initiative. It contrasted them with Redevco's proposed alterations to the rear of the building which, it claimed, would "nullify" Mount Cook's proposals. However, it did not embody them in any planning application of its own, indicating that it would not do so unless agreement could be reached for Redevco's proposals to conform broadly with its own.

8 The council's response to Mount Cook's alternative proposals was that they were too vague for proper consideration and advice by its officers, though it proffered some "initial" advice indicating that the proposals were likely to be unacceptable. However, the council informed Mount Cook that its objections to Redevco's application would be put before the planning applications sub-committee meeting on 21 March 2002 when it was due to consider the application. (The council later accepted that this initial advice had been based on the wrong set of plans.)

A 9 The council's director of planning and transportation, in a report prepared for the sub-committee, recommended the grant of conditional permission. He referred to Mount Cook's main objection in general terms, and identified as background papers available to the members of the sub-committee various correspondence from Mount Cook's advisers setting out its objections in detail, in particular by comparison with its own proposals. He advised the committee in the following terms that those B proposals were irrelevant to the determination of Redevco's scheme:

> "An alternative scheme has been submitted on behalf of the freeholders for new shop fronts to the Market Place elevation of the building. Given that each case is treated on its own merits, these proposals are not considered relevant to an evaluation of this application."

C And, in subsequent correspondence, the council stated that the planning officer responsible had circulated the Mount Cook correspondence to the members of the sub-committee, who had fully considered it. Mount Cook's solicitors' note of the meeting records that the planning officer responsible for the application had referred to Mount Cook's advisers' letters, summarised its concerns as set out in the report for the meeting, "with the addition of a reference to improving Market Place", and advised that, as to D the complaint about prejudicing future applications, Redevco's application had to be considered on its merits. The note also records that he and another officer expressed the view that the proposal would enhance the building and the appearance of the conservation area. Notwithstanding Mount Cook's objections, the sub-committee approved the application.

10 There then followed further correspondence in which Mount Cook E complained to the council about the decision, repeated its earlier assertion that Redevco's proposed alterations would undermine the likelihood of any extension of the Oxford Market Initiative to the southern part of Market Place, and threatened not to pursue its proposals for that extension if Redevco's approved alterations went ahead. At the same time Mount Cook's solicitors wrote to the council informing it of Mount Cook's intention, if necessary, to seek judicial review of the sub-committee's F decision on a number of likely grounds, including:

> "failure to have regard or proper regard to the effect that implementation of the approved proposal is likely to have on the conservation area within which the building is situated particularly with regard to its adverse impact upon the prospects of completing improvements to the conservation area begun by the Oxford Market Initiative."

G 11 The council, in a letter in reply indicating its intention to refer back for clarification to the committee another objection of Mount Cook immaterial to this appeal, stated that it had had proper regard to the impact that the proposal was likely to have on the conservation area. Mount Cook, after sight of a report by the planning officer for the further committee hearing, decided not to pursue the objection giving rise to it. In that second H report, the planning officer referred again to Mount Cook's main ground of objection to the application:

> "Since this application was presented to the sub-committee in March there has also been further correspondence on behalf of the freeholder. This refers to the adverse implications of the proposed works, in

particular the creation of dead frontage to north elevation of 200 Oxford Street, for potential improvements in Market Place linked to extending the 'Oxford Market Initiative'. Sub-committee considered a similar objection previously. There is no agreed package of environmental improvements for this part of the public highway."

In the result, the council, by letter of 9 May 2002, formally granted conditional permission to Redevco in accordance with its application and Mount Cook duly proceeded with its application for permission to claim judicial review.

12 As Moses J observed [2002] EWHC 2125 (Admin) at [9], there is no doubt that the sub-committee was advised that Mount Cook's proposals were irrelevant to its consideration of Redevco's application. In neither of the planning officer's reports was it suggested that those proposals were matters that it ought to take into consideration.

The applications at first instance for permission to claim judicial review

13 Mount Cook's application was first considered and rejected as unarguable on paper by Ouseley J In his observations, he said that the council was entitled to disregard Mount Cook's alternative proposals because it would have been irrational for the council to have relied on them as a basis for refusing permission to Redevco's beneficial scheme. He added that, even if Mount Cook's scheme could have been regarded as more beneficial than that of Redevco, there was no evidence that it was capable of implementation or that a refusal of permission would assist their implementation. Accordingly, the difference in practice between ignoring Mount Cook's scheme and giving it no or negligible weight, as the advice to the council would obviously have been, was nil.

14 Mount Cook indicated its intention to renew its application by way of oral hearing. And the council, having filed an acknowledgment of service pursuant to the new provision for it in CPR r 54.8, indicating its wish to take part in the judicial review and to contest the claim, also indicated its intention to attend the renewal hearing. The hearing before Moses J lasted nearly a full day, and was, for all practical purposes, a hearing of the substantive claim. Both parties appeared by counsel who had provided the court with skeleton arguments. And both parties filed all the evidence that would have been required at a substantive hearing if it had gone that far.

15 Moses J took a similar view to that of Ouseley J, emphasising also that an applicant for planning permission, whose proposal conforms to local planning policies, does not have to show planning benefit, but simply lack of planning harm. On the main issue as to the relevance to the planning decision of Mount Cook's alternative proposals, he said, at paras 12, 13 and 17 of his judgment:

"12. . . . The council had no power to refuse permission on the basis that the proposal would not enhance he character of the area: see *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141. The only obligation of the council was to consider whether the development left the character or appearance of the conservation area unharmed. In fact, the officer advised that the proposals would enhance the character and appearance of the building and the conservation area, and meet the policy tests . . . The fact that there might have been a better

A scheme for enhancement was, in the view of the council, nothing to the point. That, in my judgment, was an approach that the council was perfectly entitled to adopt.

"13. Further, the suggestion that the council was bound to consider the alternative scheme is, in my view, fallacious because there was no basis for suggesting that there was any possibility of the proposals of the
B claimants coming to fruition . . . Redevco owns a 999-year lease of number 200. It is plain that they were intent upon developing the north side of the building in the way they proposed. The claimants had no power whatever to compel them to do otherwise. If permission were refused then the northern aspect of that building would remain as it was. In my view, it is not arguable that it is open to the claimants to seek to exercise some control over the building in the face of Redevco's leasehold
C interest, by saying that as a matter of law the council was under an obligation to consider alternative schemes as disclosing a better proposal."

"17. There is, in my view, nothing in ground 1. The claimants had no realistic prospect of being able to force Redevco to adopt their plan. The council was correct in law to regard the existence of rival proposals
D as being irrelevant. Even it is was not irrelevant, it was bound to make no difference to the result, as Ouseley J said when refusing permission in writing."

16 Moses J also rejected as irrelevant and unarguable a second objection of Mount Cook that the grant of permission would be likely to prejudice, contrary to the council's planning policy SS2, the future retention
E of the upper floors of the building in retail use.

17 In the result, he refused permission to apply for judicial review and ordered the costs of the application, which he summarily assessed at £11,508·13, to be paid by Mount Cook to the council.

The issues

F **18** There are four issues in this judicial review claim, which the court, in granting permission to appeal from Moses J's refusal of permission, directed it should retain and determine for itself. Two are matters of planning law, the third concerns a court's discretionary power to refuse relief and the fourth is one of costs at the permission stage of claims for judicial review. They are: (1) whether a local planning authority, when determining a
G planning application, is entitled to grant it without regard to a possibility, where drawn to its attention, of an alternative and preferable proposal; (2) whether a local planning authority, in determining a planning application for operational development of land, is entitled to refuse it on the ground that grant of it would make a future change of use contrary to its local planning policy materially harder to resist; (3) whether, in the event of the court holding that the council had erred in law in granting Redevco's
H application for planning permission, it would nevertheless be entitled to dismiss Mount Cook's claim for judicial review in the exercise of its discretion; and (4) the circumstances in which a court, on an oral application for permission to claim judicial review, may award costs to a defendant who has attended and successfully resisted the application.

Issue 1—the materiality to a planning application of a possibility of an alternative preferable proposal

19 As I have indicated, Ouseley and Moses JJ were of the view that the council was entitled to disregard Mount Cook's alternative proposals, notwithstanding its representations to it that they were preferable in planning terms to those of Redevco. Mr John Steel QC, for Mount Cook, in challenging Moses J's ruling, submitted that he was wrong in law in holding that its alternative proposals for the building and southern part of Market Place were irrelevant to the council's determination of Redevco's application for operational development to the northern elevation of the building. In particular, he argued that the judge erred in ruling that, as the council had considered Redevco's application acceptable in planning terms, it had no power to refuse it on the basis that on the basis that there was or might be some other preferable scheme. He also criticised the judge's reliance upon Mount Cook's lack of effective control of the building so as to give effect to its proposals as further support, if necessary, for his view of the immateriality or lack of weight of its suggested alternative.

20 The starting points, as Mr Steel noted, are sections 54A, as inserted by section 26 of the Planning and Compensation Act 1991, and 70(2) of the Town and Country Planning Act 1990, which provide:

> "54A Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise."
>
> "70. . . . (2) [In making a determination of a planning] application the [local planning] authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

21 The critical question, which it seems to me is one of mixed law and fact, is, therefore, whether the existence of a possible alternative scheme more beneficial in planning terms than that proposed in a planning application is a "material consideration" for this purpose. The Act gives no help as to what may constitute such a consideration, but the following words of Cooke J in *Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281, 1294 are usually taken as an all-context starting point:

> "any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances."

The submissions

22 Mr Steel submitted that Cooke J's broad description includes the consideration in this case of the existence of a possible alternative, preferable, use for the land in question. He maintained that it would be open to a decision-maker to refuse planning permission for an otherwise acceptable development where he considers it desirable in planning terms to preserve an alternative option, since to grant permission in such circumstances would or could amount to a wider planning harm. In that sense, he defined "planning harm" as an absence of planning benefit, for example, a failure in the

A application proposal to assist some general local planning policy. He sought support for that submission in the judgment of Mr Christopher Lockhart-Mummery QC, sitting as a deputy judge of the Queen's Bench Division, in *Nottinghamshire County Council v Secretary of State for the Environment, Transport and the Regions* [2002] 1 P & CR 30, a case in which the deputy judge upheld the decision of an inspector refusing permission for a residential development in the light of his view that it was desirable to preserve an option of retaining the land in question for educational use. The deputy judge dealt with the relevance of such a consideration as a matter of principle at para 36 of his judgment:

B

> "If the judgment is made, whether through the development plan process or indeed outside it, that it appears desirable to preserve the option of using a piece of land for a purpose seen to be of benefit in the public interest for the country or the local community, this is in principle, a material planning consideration for the purposes of sections 70(2) and 54A of the Act. I understood this to be common ground in the case. The weight given to the consideration will vary hugely from case to case . . . Each case will turn on its own merits, but the importance of the project or proposal, its desirability in the public interest, are undoubtedly matters to be weighed. Therefore, in considering whether to grant planning permission for a proposal (use B) which will pre-empt the possibility of desirable future use (use A), the relative desirability of the two uses have to be weighed. *In striking the balance, the likelihood of use A actually coming about is doubtless a highly material consideration.*" (My emphasis.)

C

D

E **23** As can be seen from those observations, the deputy judge had in mind not only the materiality of such a consideration but also its weight. He included in the latter the importance and desirability of the alternative proposal to the public interest, and seemingly, in his reference to "striking the balance", the likelihood of it coming about. In practice, at the margins the questions whether a consideration is material and, if so, what, if any, weight should be given to it, shade into each other.

F **24** But Mr Steel sought to draw two further propositions from the *Nottinghamshire County Council* judgment of particular relevance to the facts of this case.

25 First, he submitted that it is open to a decision-maker to refuse permission because of the existence of an alternative, possibly more desirable, scheme in planning terms even where there was no evidence on which he could conclude that it is likely to go ahead. That was certainly part of the reasoning of the deputy judge in the following passage in para 40 of his judgment:

G

> "I accordingly hold that, subject to matters to which I turn below, it was in principle open to the inspector to refuse residential development in the instant case, in the light of his conclusion that it was desirable to preserve the option of retaining the appeal site for educational use, albeit that he made no finding that it was more likely than not that the site would effectively be put to educational use."

H

Such a proposition, which the deputy judge derived in part from the judgment of Mr George Bartlett QC, sitting as a deputy judge of the Queen's Bench

Division in *South Buckinghamshire District Council v Secretary of State for the Environment, Transport and the Regions* [1999] PLCR 72, 79–80, logically follows from his first proposition, at para 22 above, in those cases where the importance or desirability in the public interest of preserving a particular alternative option is so great that the decision-maker could reasonably conclude that to grant the application in the circumstances would or could constitute a planning harm. Again, both the preferability in planning terms of an alternative scheme and the degree of possibility or likelihood of it coming about may, depending on their relative strength, go to materiality or to weight. In the context of this case, Mr Steel placed much emphasis on: (1) the claimed public importance and desirability of extending, in the outline way in which Mount Cook proposed, the Oxford Market Initiative, including the provision in the rear elevation of the building of *both* retail displays and access to the retail areas behind them from Market Place; and (2) the fact that Mount Cook had alerted the council to its proposals and also to its contention that grant of permission to Redevco to make its alterations would preclude the possibility of them coming about.

26 However, Mr Steel needed, in the circumstances of this case, to advance a second argument, namely that an alternative scheme is a material consideration to a decision on an application for planning permission even where, on the facts before the decision-maker, there is no likelihood or real possibility of that alternative scheme eventuating. Having developed his argument thus far, he submitted that Ouseley and Moses JJ were wrong to hold that Mount Cook's proposals were irrelevant to—as distinct from having no weight in—the council's determination of the Redevco application. He maintained that Moses J erred in law in stating that the only obligation on the council was to consider whether the application "left the character or appearance of the conservation area unharmed". Both propositions, he submitted, were contrary to the *Nottinghamshire County Council* decision [2002] 1 P & CR 30, the effect of which was that alternative schemes were material considerations. The fact that they were unlikely to come about went to their weight not their materiality, and did not of itself preclude the decision-maker from refusing planning permission in order to preserve the possibility of taking planning advantage of them if they did. He added that the fact that the council could not force Redevco to implement Mount Cook's scheme did not meet the point that its responsibility was to regulate the use of land in the public interest and that a refusal of the sought planning permission could have prompted Redevco to submit a further application more in keeping with Mount Cook's proposed alternative.

27 Mr Timothy Corner QC, for the council, submitted that Moses J correctly found that the council had been entitled to disregard Mount Cook's alternative proposals, despite its assertion that they could be undermined by the grant of Redevco's application for operational changes to the rear elevation of the building. He said that Mount Cook's proposals were irrelevant and that, even if they were relevant, they were bound to make no difference to the result, as both Ouseley and Moses JJ found. On the issue of materiality, he made two submissions: (1) the existence of an alternative scheme is not capable of rendering an otherwise acceptable development unacceptable, and is on that basis alone an immaterial consideration; and (2) further or alternatively, on the facts of the case, Mount Cook's proposals were immaterial in that they were too vague to

A amount to an alternative scheme worthy of consideration and, in any event, had no reasonable prospect of being implemented.

28 As to the first of those submissions, Mr Corner said that the council, in determining Redevco's application, had to have regard to the development plan and other material considerations and, if, having regard to those matters, it found the application acceptable, it was bound to grant permission. It could not be a material consideration that there might be a B better scheme. Section 70(2) of the 1990 Act does not demand a comparison between alternative projects; it does not even require that application proposals should enhance, as distinct from preserve, the character or appearance of a conservation area in which the subject property is situate: see *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141. (As I have said, and as it happens, the C council's officers advised the council's planning sub-committee that Redevco's application proposals would themselves enhance the conservation area.) But if enhancement is required, that would not require a comparison between alternative proposals in a case such as this. He submitted that, if the council had refused permission on this ground its decision would have been judicially reviewable as irrational because it would have failed to consider the application on its merits. He added that the facts that Mount Cook D proposed to extend the Oxford Market Initiative to the southern part of Market Place including the rear elevation of the building and had threatened not to implement that proposal if Redevco's permission stood, cannot make the possibility of its proposal a material consideration when, as a matter of law, it would not otherwise be.

29 Mr Corner's alternative submission was that, even if Mount Cook's E proposals are capable in principle of being material, they were not so in the circumstances for the reasons given by Moses J, in para 13 of his judgment, that Mount Cook had no power to bring them to fruition and/or that, in any event, they were of no or negligible weight. He acknowledged case law, including the *South Buckinghamshire District Council* case [1999] PLCR 72 indicating the permissibility of refusal of planning permission in order to preserve an existing use of land or to preserve it for some desirable use. But he F maintained that, unlike the circumstances of this case, there must at least be a realistic possibility of such use eventuating if permission is refused. He submitted that Mr Lockhart-Mummery QC's decision in the *Nottinghamshire County Council* case is not authority to the contrary since, there, the issue was whether the inspector had been entitled to refuse permission for residential development of land that was suitable for the purpose of a new primary school, which was likely to be needed and for which G it had been allocated in the local plan. He added that, even though the inspector in that case had not concluded on a balance of probabilities that the land would be needed for that purpose, the deputy judge had found that he had been entitled to refuse permission since, given the scarcity of land and possible need for this site for educational purposes, the policy plan's preservation of the land for that purpose was, in the circumstances, a material consideration.

H

Conclusions

30 Mr Corner, in the course of his submission, put forward the following general propositions which, with some slight additions, I accept as correct statements of the law and as a useful reminder and framework when

considering issues such as this. They are: (1) in the context of planning control, a person may do what he wants with his land provided his use of it is acceptable in planning terms; (2) there may be a number of alternative uses from which he could choose, each of which would be acceptable in planning terms; (3) whether any proposed use is acceptable in planning terms depends on whether it would cause planning harm judged according to relevant planning policies where there are any; (4) in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant in planning terms; (5) where, as Mr Corner submitted is the case here, an application proposal does not conflict with policy, otherwise involves no planning harm and, as it happens, includes some enhancement, any alternative proposals would normally be irrelevant; (6) even, in exceptional circumstances where alternative proposals might be relevant, inchoate or vague schemes and/or those that are unlikely or have no real possibility of coming about would not be relevant or, if they were, should be given little or no weight.

31 Turning to the circumstances of this case, it is clear that Redevco's application, if considered on its own, would not be harmful in a planning sense and would enhance the building and the conservation area of which it is part. Stopping there, and still considering the application on its own, that is more than Redevco needs to establish to justify the grant of permission. It is enough for it to show that its proposed development would not adversely affect the character or appearance of the area and is otherwise unobjectionable on planning grounds; it is not necessary for it to show that its proposals would constitute an enhancement in planning terms: see the *South Lakeland District Council* case [1992] 2 AC 141, 150F–H, per Lord Bridge of Harwich (with whom the other Law Lords agreed). However, the issue raised by Mount Cook—which was not raised in the *South Lakeland* case—is that the proposals in Redevco's application, if considered alongside its, Mount Cook's, alternative proposals, would or could be harmful in a wider planning sense of frustrating or endangering a more favourable solution for the building and the area. Put more shortly, its case is that Redevco's proposed enhancement should yield to its proposed better enhancement.

32 In my view, where application proposals, if permitted and given effect to, would amount to a preservation or enhancement in planning terms, only in exceptional circumstances would it be relevant for a decision-maker to consider alternative proposals, not themselves the subject of a planning application under consideration at the same time (for example, in multiple change of use applications for retail superstores called in by the Secretary of State for joint public inquiry and report). And, even in an exceptional case, for such alternative proposals to be a candidate for consideration as a material consideration, there must be at least a likelihood or real possibility of them eventuating in the foreseeable future if the application were to be refused. I say "likelihood" or "real possibility", as the words tend to be used interchangeably in some of the authorities: see eg *New Forest District Council v Secretary of State for the Environment* (1995) 71 P & CR 189, per Mr Nigel Macleod QC, sitting as a deputy judge of the Queen's Bench Division. If it were merely a matter of a bare possibility, planning authorities and decision-makers would constantly have to look over their shoulders

A before granting any planning application against the possibility of some alternative planning outcome, however ill-defined and however unlikely of achievement. Otherwise they would be open to challenge by way of judicial review for failing to have regard to a material consideration or of not giving it sufficient weight, however remote.

33 When approaching the matter as one of likelihood or real possibility, as I have already indicated, it may often be difficult to distinguish between B the concepts of materiality and weight; and both, particularly weight, are essentially matters of planning judgment. But I do not consider that a court, when considering the rationality in a judicial review sense of a planning decision, should be shy in an appropriate case of concluding that it would have been irrational of a decision-maker to have had regard to an alternative proposal as a material consideration or that, even if possibly he should have C done so, to have given it any or any sufficient weight so as to defeat the application proposal.

34 In so concluding, I have been assisted by the judgment of Laws LJ in this court in *R (Jones) v North Warwickshire Borough Council* [2001] 2 PLR 59. In that case a planning committee considering an application for planning permission to construct dwelling houses declined to consider an alternative site referred to by objectors and granted permission. Laws LJ, D with whom Aldous LJ and Blackburne J agreed, upheld the committee's decision, holding that they were entitled to disregard the alternative site. In so holding, he stated as a general proposition, and after reference to authorities (including the judgment of Simon Brown J in *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P & CR 293, 299), that consideration of alternative sites would be relevant to a planning E application only in exceptional circumstances. However, in his explanation of the proposition, it is plain that, in his use of the word "relevance", he had in mind both materiality and weight, a practical approach with which, as I have just indicated, I respectfully agree. Whilst that case concerned a possible alternative site for the sought development, and Mount Cook's proposals include alternative options for the application site, the approach of Laws LJ seems to be equally applicable. This is how he put it, at F paras 30–33 of his judgment:

> "30. . . . consideration of alternative sites would be relevant to a planning application only in exceptional circumstances. Generally speaking—and I lay down no fixed rule . . . such circumstances will particularly arise where the proposed development, although desirable in itself, involves, on the site proposed, such conspicuous adverse effects that G the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration.
>
> "31. . . . But even if the potentially available site . . . were not a *necessary* planning consideration, might a reasonable planning authority nevertheless have regarded it a *possible* planning consideration, and so should have taken it into account?
>
> H "32. . . . I do not think so. There were no clear planning objections here (to use Simon Brown J's language [in the *Trusthouse Forte Hotels* case]. In context, the learned judge in that case, by those words, was, I think, referring to substantial objections, which were on the facts, made out. Here, there were, of course, objections, otherwise plainly we would

not be here at all. There had been objections in relation to . . . [the alternative site] as well. If the council, as the judge held, were obliged to consider whether to have regard to the alternative site, that can only have been upon the basis that that factor might have prevailed so as to persuade the council to refuse planning permission. But, in my judgment, it was simply not capable of amounting to a good enough reason for refusing planning permission on the site in question here. Objections put forward against a planning applications such as this are, of course, judged upon their merits. If they outweigh the planning benefits of the development applied for, the application will be refused. To introduce into that equation a consideration of a different character, namely whether there would be less disbenefits on another site, could only be justified for some special reason, such, as I have said, as the existence of particularly pressing need for the development . . .

"33. It follows, in my judgment, that no reasonable council could have treated the . . . [alternative site] as relevant. In those circumstances, it matters not that the council thought that they were obliged not to consider it. If they had considered it, they would have been bound to reject it."

35 In addition, there is nothing in the *South Buckinghamshire* case [1999] PLCR 72 or the *Nottinghamshire County Council* case [2002] 1 P & CR 30 to support the view that, where on the facts before an inspector, there is no likelihood or real possibility of an alternative proposal proceeding if the planning application under consideration were refused, that it should be refused anyway against the bare possibility of that or some other alternative more beneficial scheme eventuating. Indeed, such a suggestion is directly contrary to the concluding words in para 36 of Mr Lockhart-Mummery QC's judgment in the *Nottinghamshire County Council* case (see para 22 above), more aptly going to weight rather than whether the alternative is a material consideration: "In striking the balance, the likelihood of use A actually coming about is doubtless a highly material consideration." It would be highly harmful to the efficient and otherwise beneficial working of our system of planning control if decision-makers were required to consider possible alternatives, of which, on the facts before them, there is no likelihood or real possibility of occurrence in the foreseeable future.

36 Accordingly, I agree with the approach of Ouseley and Moses JJ and the submissions of Mr Corner. In the circumstances of this case the alternative proposals of Mount Cook, such as they were, were not material considerations within sections 54A or 70(2) of the 1990 Act or, if they were, they were of such negligible weight that the court was entitled to refuse permission to apply for judicial review because the council could not reasonably have taken any notice of them.

37 As Mr Corner put it, there is no conceivable basis upon which Mount Cook's proposals could have caused the council to reach a different decision on Redevco's application: see e g *Bolton Metropolitan Borough Council v Secretary of State for the Environment* [2017] PTSR 1063, 1071; (1990) 61 P & CR 343, 353, per Glidewell LJ, and the *North Warwickshire* case [2001] 2 PLR 59, 65, per Laws LJ. On the contrary, if the council had refused these relatively minor alterations, its decision would have been

judicially reviewable for failure to consider the application properly on its own merits.

38 The council had an obligation to consider Redevco's application on its own merits, having regard to national and local planning policies and any other material considerations, and to grant it unless it considered the proposal would cause planning harm in the light of such policies and/or considerations. On the following information before the council, I do not consider that it is usurpation by the court of the council's responsibility for the planning decision, as suggested by Mr Steel, to refuse Mount Cook's claim for judicial review. That is so, even if the matter is one of weight as distinct from the materiality of the consideration.

39 First, Mount Cook's proposals included works to the building that were different from those proposed by Redevco in its application, and Mount Cook could not implement them without Redevco's consent. Redevco had not given any such consent and, in persisting with its application for planning permission, was clearly not minded to do so. Second, there was and is no evidence before the council of any prospect of Redevco giving such consent. And, contrary to Mr Steel's suggestion, I do not consider that the council had a duty to test Redevco's attitude by refusing its application in order to see whether, as a result of negotiation between the parties or otherwise, that would produce a change of heart. Third, as Mr Corner emphasised, Mount Cook's alternative proposals were "extremely inchoate". They did not take the form of a planning application, but merely, as Mount Cook's advisers described them, of "further options in the form of urban design studies for improvements". As the council's planning officer had observed in correspondence with Mount Cook's advisers, its proposals for general improvement of the southern part of Market Place were vague, in particular "very sketchy" with regard to its proposed works to the highway and without details for implications of traffic movement and servicing. In the circumstances, and, as I have said, Mount Cook's threat that it would not continue with its wider proposals if Redevco was permitted to proceed with its alterations to the building could not have a life of its own as a material consideration. That is not only because of the lack of any likelihood or real possibility of Mount Cook being able to bring about its proposals for the building but also because there was no evidence before the council that refusal of Redevco's application would assist it in doing so.

Issue 2—whether the permission of external operational development coupled with proposals to make internal alterations not in themselves susceptible to planning control, might prejudice future planning control of non-conforming change of use

40 This issue concerns the relationship between external operational development for which Redevco sought and obtained planning permission, in particular the installation of new doors and a segregated entrance lobby on the Market Place elevation and the removal of black film from the inside of the windows on the first and second floors, and the internal alterations that it proposed, which did not require planning permission, including the removal of an internal escalator between the second and third floors. Mount Cook maintained that the internal alterations could prejudice the continued retail use of the building, making reference to Redevco's pending separate

application for permission for change of use of the upper floors of the building from retail to office and residential use. Mount Cook's expressed concern was that such internal alterations, in conjunction with the external development the subject of the application, could make it more difficult for the council thereafter to resist applications for such change of use in conflict with policy SS2 in the local plan to protect retail floor space in large stores trading on several floors. The planning officer, in his written report to the planning sub-committee, advised:

> "Notwithstanding the objectors' concerns about the future use of the building, the council has a duty to consider the current application on the basis on which it has been submitted i e for continued retail use. Any objections relating to the loss of retail accommodation on the upper floors would be assessed as part of a separate application."

He confirmed this advice orally to the sub-committee on its consideration of the application, observing that the application proposal would enhance the appearance of the building and the character and appearance of the conservation area and that it had to be considered on its own merits.

41 As Moses J observed, in para 18 of his judgment, the council's planning sub-committee clearly considered and rejected these additional arguments of Mount Cook. It decided that removal of film to the windows on the upper floors of the building would not prejudice the further use of those floors for retail use and pointed out that the removal of the internal escalator was not the subject of planning control. He rejected this challenge to the permission, observing that the council had rightly decided to grant it on the basis that Redevco's proposals, not only would not harm, but would enhance, the appearance of the Market Place frontage to the building, and would not inhibit the council's planning control over any future attempts to secure non-conforming change of use. He observed that, in so far as the prospects of continued retail use of the upper floors might be lessened by the removal of an internal escalator, as such removal was not subject to planning control the council could not, therefore, prevent it. He thus considered that the council had correctly considered the application on its own merits and that Mount Cook's expressed fears for the future were irrelevant and unarguable.

Submissions

42 The main burden of Mr Steel's argument was that, although Redevco could continue retail use of the upper floors of the building and would require planning permission for any change of use, its present proposals, if they proceed, would undermine resistance to such change. He prefaced his detailed submissions with the observation that operational development undertaken in a building can be relevant to a determination whether there has been a material change of use of the building, citing *Impey v Secretary of State for the Environment* (1980) 47 P & CR 157, and that internal alterations, though not themselves susceptible to planning control, may be the subject of enforcement proceedings where they are an integral part of unauthorised use of the building, citing *Somak Travel Ltd v Secretary of State for the Environment* (1987) 55 P & CR 250, 256, per Stuart-Smith J. He claimed that such relationship between operational development and effecting or facilitating unauthorised change of use also applies where

A operational development for which permission is being considered is "integral to an (as yet) unauthorised future use". He maintained that a decision-maker considering an application for such permission is entitled to have regard to its practical effect on future use and to refuse it on the ground that it might make it hard to resist a subsequent application for a material non-conforming change of use. Applying that extension of the principle to the facts of this case, he submitted that, given Redevco's pending application B for change of use of the upper floors of the building to office and residential use, the proposed inclusion in the sought operational development of new doors to the Market Place elevation and removal of black film from the first and second floor windows would facilitate a segregated entrance lobby for the proposed change of use on the upper floors. On that basis, he maintained that the council had failed to have regard to a consideration material to its C decision and that Moses J was wrong to dismiss the complaint on the ground that it was irrelevant.

43 Mr Corner submitted that the judge rightly held that the council was entitled to consider Redevco's application on its own merits and to disregard the suggestion that to grant permission on that basis would be likely to facilitate future non-conforming loss of retail use on the upper floors of the D building. He submitted that such a concern was not relevant to the present application, which was not for change of use, but to the quite separate application that Redevco had pending for such change of use, and that Moses J was correct to reject the submission as irrelevant and unarguable for the reasons he gave. He added that there is nothing in the grant of planning permission for the external works that would prevent the council from either refusing planning permission for change of use or from taking enforcement E proceedings to prevent any such unauthorised use.

Conclusion

44 This complaint of Mount Cook—one of "planning creep"—is barely distinguishable from its first challenge, namely that it was a material consideration for the council that the grant of permission to Redevco would F or might frustrate an alternative scheme of enhancement—an argument to which, save in exceptional circumstances, the *South Lakeland* authority [1992] 2 AC 141 is a bar. Here too, the correct approach for the council's planning sub-committee was the one it adopted, namely to consider whether Redevco's proposal would cause planning harm by assessing it against doing nothing, not as against any potential enhancement that might emerge from G Mount Cook's proposals. As it happens, the council's planning sub-committee did consider and reject Mount Cook's contentions as to possible planning creep. As to Mr Steel's reliance on the *Impey* and *Somak* cases, both, unlike this case, were concerned with a present non-conforming change of use, in the former whether internal alterations could properly be taken into account in enforcement proceedings in respect of unauthorised change, and in the latter whether, as an integral part of unauthorised use, H they could be the subject of enforcement proceedings. And, as to Redevco's pending application for change of use to mixed office and residential use on the upper floors, that is an application of which the council's planning sub-committee considering this application for operational development was aware, and which it can decide when the matter comes before it.

Issue 3—discretionary refusal of relief

45 If I am right in my conclusion that Mount Cook's claim is unarguable on the law and facts, the question of refusal or relief in the exercise of the court's discretion does not arise. However, in view of the conflicting submissions of counsel on this issue, I should make plain that, if it had been necessary to consider the point, I would not have refused relief in the exercise of my discretion in reliance on the motive of Mount Cook in seeking it, namely to put pressure on Redevco to sell its lease to Mount Cook rather than—or in addition to—a genuine concern about future loss of retail use in the upper parts of the building.

46 The essential question for a decision-maker in planning matters is whether representations one way or the other, whatever the motives of those advancing them, are valid in planning terms. A collateral motive may have relevance to the reasonableness of a landlord's refusal to consent to alterations, as Mr Paul Morgan held in his judgment in the leasehold dispute between the parties that I have mentioned in para 5 of this judgment. But judicial review applications by would-be developers or objectors to development in planning cases are by their very nature driven primarily by commercial or private motive rather than a high-minded concern for the public weal. I do not say that considerations of a claimant's motive in claiming judicial review could never be relevant to a court's decision whether to refuse relief in its discretion, for example, where the pursuance of the motive in question goes so far beyond the advancement of a collateral purpose as to amount to an abuse of process. The court should, at the very least, be slow to have recourse to that species of conduct as a basis for discretionary refusal of relief. In any event, it would, as Mr Steel pointed out, be exceptional for a court to exercise discretion not to quash a decision which it found to be ultra vires: see *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, 616D–G, per Lord Hoffmann, approving an observation of Glidewell LJ in *Bolton Metropolitan Borough Council v Secretary of State for the Environment* [2017] PTSR 1063, 1071.

Issue 4—costs at the permission stage

47 The fourth issue raises a matter of considerable public importance, namely as to the guidance to be given by this court concerning the award of costs at the permission stage of claims for judicial review. The issue affects not only claimants and defendants, but also interested parties and the court itself in the access that it provides to justice, having regard to the overriding objective of dealing with cases justly in CPR r 1.1 and good public administration. More precisely, on the facts of this case, the issue is whether Moses J was entitled in the exercise of his discretion to order Mount Cook to pay the council's costs of filing an acknowledgment of service and of successfully resisting its oral application.

48 The issue arises under the relatively new procedure for the grant of permission for claiming judicial review introduced by CPR Pt 54 on 2 October 2000, supplemented by a Judicial Review Practice Direction. Both followed a review of the Crown Office under the chairmanship of Sir Jeffery Bowman, who submitted his report ("the Bowman report") to the Lord Chancellor in March 2000. This procedure replaced the practice under RSC Ord 53 of an ex parte application for leave to move for judicial review,

A normally made on paper, but which could also be made orally at an ex parte hearing. A respondent, if notified of the application ("ex parte on notice"), could make representations on paper and/or, if he chose to attend and was allowed by the court to participate in a permission hearing, orally. If a respondent successfully resisted the grant of permission at an oral hearing, the court had power to award him costs against the applicant, but it was sparing in its exercise of it. Given that practice, renewed oral applications B for permission were normally heard ex parte and were, in any event, short. Applicants, on the whole, were able to seek relief without fear, if permission was refused, of being saddled with the respondent's costs at that stage.

49 The new procedure involves the proposed defendant and any interested party right from the start and is generally dealt with in the first instance as a paper application. By CPR r 54.7 the claimant must serve a C claim form on the defendant and any interested party within seven days of issue. By CPR r 54.8 any such person "who wishes to take part in the judicial review" is required to file an acknowledgment of service". If he files an acknowledgment of service and intends, in taking part in the judicial review, to contest the claim, CPR r 54.8(4) requires him to plead it in the acknowledgment of service and to summarise his grounds for doing so.

50 However, CPR Pt 54 says nothing direct about the costs of filing D such a document, nor indeed about the costs of and incurred by a defendant who chooses, in accordance with his entitlement under paragraph 8.5 of the practice direction, to attend and argue his case at an oral renewal hearing. There is an indirect reference to costs in CPR r 54.9. By rule 54.9(1) a failure to comply with the requirements as to acknowledgment of service by a party who subsequently seeks to take part in a permission hearing may, but will E not necessarily, result in the court not allowing him to do so. But if he is allowed to take part, by rule 54.9(2), the court may take his failure into account "when deciding what order to make about costs", a provision that may have as one of its premises that a successful defendant at the permission stage who *has* complied with CPR r 54.8 should normally be entitled to his costs of filing the acknowledgment of service. Another premise may be that a defendant who has not complied with CPR r 54.8 and who has not F attended a permission hearing, but who later succeeds on the substantive hearing of the claim, should have some or all of his costs disallowed because of his failure to comply with rule and thus to put his case to the court at the permission stage.

51 However, regardless of the question of costs, there is now a positive obligation on a defendant or other interested party served with the claim form to acknowledge service and to consider in doing so: (1) whether to G contest the claim, and, if so, on what grounds and at what stage; and (2) if he decides to contest it, to summarise his case at the permission stage. The clear purposes of these changes, as recommended in the Bowman report, are to enable the judge dealing with the application on paper to identify at that early stage the strengths and weakness of the proposed claim and to encourage, where appropriate, settlement of meritorious claims at the permission stage.

H **52** The only direct provision as to costs at the permission stage is that in paragraph 8.6, when read with paragraph 8.5, of the practice direction. Those paragraphs read:

> "8.5 Neither the defendant nor any interested party need attend a hearing on the question of permission unless the court directs otherwise.

"8.6 Where the defendant or any party does attend a hearing, the court will not generally make an order for costs against the claimant."

There are two important points to make about these provisions. First, on one view, when read together, they provide that, in general, a claimant should not have to pay a defendant's or other interested party's costs of attendance at a permission hearing, but say nothing about the costs of filing an acknowledgment of service by a defendant who intends "to take part" in the judicial review, whether or not he subsequently attends such a hearing. On another view, they do not, or should not, distinguish between the costs of obligatory acknowledgment of service and of optional attendance at a permission hearing whether or not the party who has filed an acknowledgment of service attends such a hearing: see McCracken and Jones, "Leach and Permission Costs" [2002] JR 4. Second, the guidance, in my view, applies to the costs of preparation for, as well as of attendance at, a hearing.

53 The council, which intended to contest the sought judicial review, filed an acknowledgment of service, as required by CPR r 54.8(2) and (4), and, as is plain from the facts giving rise to this appeal, attended and successfully resisted the grant of permission at the permission hearing.

54 Before I continue, I should mention the ruling of Collins J in *In re Leach* [2001] CP Rep 97, a case concerning a defendant's claim to the costs of filing an acknowledgment of service, and the effect attributed to it in the notes in *Civil Procedure*, at paras 54.12.5–54.12.6: see para 55 below. The case did not concern the costs of an oral permission hearing, for there was none. The claim form and application for permission, to which the defendant had filed an acknowledgment of service indicating his intention to contest the claim and the reasons why, had been refused by a different judge on paper. The hearing before Collins J was to consider the defendant's application for an order that the claimant should pay his costs of filing the acknowledgment of service. Although only the defendant appeared and was represented by counsel at the hearing, the claimant's solicitors wrote to the court objecting to the proposed order, a letter that Collins J took into account. He made the order sought, expressing the view that, since the new procedure imposes on a defendant who seeks to take part in and contest a judicial review claim an obligation to file an acknowledgement of service containing a pleading of his case, it is only fair that he should be awarded his costs if, as a result, he successfully resists it at the permission stage. It is not apparent from the judgment whether, in reaching that view, Collins J's attention was drawn to paragraphs 8.5 and 8.6 of the practice direction. This is how Collins J put it at at paras 14–18 and 21 of his judgment, which was ex tempore:

"14. The purpose of [CPR r 54.9(2)] would appear to be that where points which showed that the claim lacked merit were not made at the permission stage but were raised on the hearing, the court might take the view that it was not fair that the applicant should pay the extra costs which could have been avoided if only the points had been made at the earlier stage. But that, of course, only underlines the point made by Mr Corner [counsel for the defendant], that if that is one of the purposes behind the new provisions, and the requirement is there, then why should the successful party, in this case the defendant, have to bear the costs of

putting forward his objections to the claim, if those objections then serve to defeat the claim? Why should he be required by the rules to incur costs which he can never recover, even if he is successful as a result of what he has done? That, submits Mr Corner, is manifestly unfair, and I agree with him. It clearly is on the face of it, and having regard to the new rules, it is [sic] difficult to see that there is any sensible answer to the submission which Mr Corner has made. It seems to me that, in principle . . . if a defendant incurs costs in submitting an acknowledgement of service, as required by the rules, then he ought to be able, if he succeeds, to recover his costs of so doing.

"15. How much in principle should he be able to recover? It seems to me that it should be limited to the costs incurred in actually producing the acknowledgement, and those will obviously depend on the circumstances."

"17. But it seems to me that if this is to prevail, and if I am right in my conclusion that, in principle, costs should be awarded, it is thoroughly undesirable that there should be a need for an application such as had to be made in this case to obtain such costs. That, of course, only adds to the amount payable.

"18. It is obvious that the Rules Committee is going to have to consider in detail the implication of this decision, but, as it seems to me, it ought to be dealt with by the judge when he deals with the permission application, and that can only happen if the application for costs is made in the body of the acknowledgement and an indication is given as to the amount of costs which are being requested. That, of course, has to be served on the other side, who would have to have an opportunity to deal with it."

"21. I am conscious . . . that I have not been able, since this is an extempore judgment and it would be equally undesirable to reserve to incur yet further costs, to have spelt out precisely what should be done for the future. One thing that seems to me to be essential is that this decision of mine, that in principle costs ought to be awarded, must be given wide publicity because I suspect that claimants at the moment are simply unaware that they run the risk of orders such as this as a result of the change in the rules."

55 I have set out Collins J's reasoning at some length to demonstrate that his ruling was confined to the award to a successful defendant at the permission stage of his costs of filing an acknowledgment of service. It did not extend to an award to a defendant of any of his other costs in successfully resisting a claim at the permission stage, in particular to any costs of and/or occasioned by an attendance at a permission hearing. However, the editors of *Civil Procedure*, in the following note on the decision, in the Autumn 2002 and 2003 editions, vol 1, at paras 54.12.5–54.12.6, appear to have given it a wider effect, suggesting that it gives a defendant a right in principle to recovery of other costs incurred in successfully resisting the claim at the permission stage, including his costs of attendance at an oral hearing:

"The High Court has now held that, as a result of the changes in the rules governing judicial review claims, a defendant who resists the grant of permission should, in principle be entitled to recover his costs. The High Court applied that principle to the costs incurred in filing an acknowledgment of service, and did not limit the defendant simply to recovering the costs of attendance at an oral hearing. Defendants who

wish to claim such costs should normally make the application for costs in the body of the acknowledgment of service and provide details of the amount claimed." A

56 That is plainly not what Collins J said. Nor would it flow from his reasoning that a successful defendant should be entitled to his costs of filing an acknowledgment because he is now obliged to serve one if he wishes to take part in and contest a claim for judicial review. Whether or not he serves an acknowledgment of service, he has no obligation to attend a permission hearing. B

57 Moses J held that there were exceptional reasons for ordering Mount Cook to pay the council its costs of and incurred by the oral renewal hearing. This is how he put it, at paras 82–85 of his judgment:

"82. It is plain now that the court will from time to time award costs to a defendant, not only of the oral hearing but also of the acknowledgement of service, despite paragraph 8.6 of the CPR Pt 54 Practice Direction—Judicial Review. The notes in [*Civil Procedure*] under para 54.12.6 make this plain, as does the decision in [*In re Leach*], a transcript of which I do not have before me, although I have seen it in the past. It does seem to me that a defendant who persists in renewing an application in circumstances such as these, where it is a highly sophisticated claimant with access to the highest possible quality legal team, pursues a claim in the face of trenchant dismissal by an experienced planning judge, forcing a local authority, funded by the local council taxpayers, to attend a full hearing, should, at the very least, pay the costs in full of the oral hearing. C D

"83. The more difficult question is as to whether it should pay the costs leading up to that hearing, in particular the preparation of papers and of the acknowledgment of service. *Generally, as it seems to me, there should be special features, which are not possible or indeed desirable to identify, before all the costs are borne*, merely because the rules require an acknowledgment of service to be filed [sic]. The whole process of applying for permission for judicial review was not intended to be like ordinary litigation: the issue of a claim with issue of a defence. The mere fact that the defendant is now required to participate does not seem to me that normally where the defendant is successful he should have his costs of that acknowledgment of service and general preparation. [My emphasis.] E F

"84. There are, however, in my view, special features in this case. It is plain that Ouseley J, a highly experienced planning judge, thought there was absolutely nothing in this case; nor do I. Although it has been skilfully argued with great attraction by Mr Steel QC, underlying it was, in my view, an absolutely hopeless attack upon the council. G

"85. In those circumstances . . . it is right that that should be reflected by the council having all its costs of resisting the claim."

58 In summary, Moses J disagreed with what he understood from the note in *Civil Procedure* was the effect of Collins J's judgment, and seemingly took the view that the guidance in paragraph 8.6 of the practice direction that costs should not generally be awarded to a defendant who attends a permission hearing applied, not only to all costs of and occasioned by it, but also to the costs of filing an acknowledgment of service. On that approach, the judge considered whether, and held that there were, exceptional circumstances—special features—for not following that guidance in relation H

A to all the council's costs leading to its success at the permission stage. He identified three such circumstances: (1) the robustness of Ouseley J, an experienced planning judge, in his expression of refusal on the papers; (2) the fact that Mount Cook had significant resources to mount the application and meet the consequences of its refusal; and (3) that it had used those resources effectively to secure a full hearing of the claim at the application stage.
B

The submissions

59 Mr Steel asked the court to set aside the judge's order for costs, bearing in mind, in particular, that this court has now granted permission to claim judicial review and has thereby acknowledged that Mount Cook had an arguable case. He submitted: (1) that *In re Leach* [2001] CP Rep 97, C whether applicable only to the costs of filing an acknowledgment of service or of wider application, conflicts with paragraph 8.6 of the practice direction and should be disregarded; and (2) that the circumstances relied on by Moses J as grounds for not following the general guidance in that paragraph were neither individually nor collectively sufficiently exceptional for the purpose. He submitted that the judge's order offended the overriding D objective in CPR r 1.1, to deal with cases justly, in that the permission stage in judicial review proceedings is intended to provide claimants with, amongst other things, a quick and relatively cheap mechanism for initiating and testing the arguability of their challenges to the decisions of public authorities. A practice of awarding costs against unsuccessful claimants, save in truly exceptional cases, would, he said, provide a disincentive to potential claimants that would run counter to that objective.

E **60** In making that submission, Mr Steel also drew on the intention expressed in paras 18–25 of the Bowman report to maintain the permission stage and to introduce defendants' acknowledgements of service in order to facilitate early and more efficient weeding out of unmeritorious applications and consideration by defendants of the legality of their conduct called in question by the claim. He drew particular attention to the indication in F para 24 of the report that, in recommending the introduction of acknowledgements of service, it was not expected that defendants or other interested parties should incur substantial expense at the permission stage. And, it was significant, he said, that the report had contained no recommendation for the grant of costs against unsuccessful claimants at that stage. In short, he submitted that the intention of the Bowman report recommendations was to produce a "quick fix" one way or another, not to G encourage full-scale "preliminary hearings" conducted as if they were hearings of substantive claims for judicial review.

61 Mr Steel distinguished the apparently contrary ruling of Collins J in *In re Leach* as limited to its own facts, namely as to the costs of filing an acknowledgment of service. But he also maintained that it should not be given general effect either as to the costs of filing an acknowledgment of H service or in the wider sense seemingly given to it in the note in *Civil Procedure*. To do so, he said, would run counter to paragraph 8.6 of the practice direction and the thinking in the Bowman report giving rise to it.

62 As to the first of Moses J's reasons for ordering Mount Cook to pay the council's costs, namely Mount Cook's renewal of the application for permission after Ouseley J's robust refusal, Mr Steel pointed out that CPR

r 54.12(3) gives a claimant a right to seek reconsideration of his application by way of an oral hearing. He submitted that, in the absence of guidance in CPR Pt 54, a claimant should not be penalised in costs for exercising a right expressly provided for by it and in respect of which the practice direction provides that, where a defendant attends such a hearing, a claimant (implicitly, whatever the outcome) will not generally be penalised in costs. He argued that neither the robustness of the refusal on paper nor the relevant experience of the judge is exceptional; paper refusals are often robust and the Administrative Court judges responsible for them are all specialists and/or experienced in this field. Second, as to Moses J's reliance on the resources of Mount Cook, Mr Steel submitted that he was wrong in law and as a matter of public policy to rely on such a factor because it put claimants with means at a disadvantage to claimants of lesser means when seeking relief from public wrongs.

63 Mr Corner's response to these arguments was that a judge's discretion to costs in this as in most proceedings is wide, notwithstanding paragraphs 8.5 and 8.6 of the practice direction. He drew attention to the wide discretion in section 51 of the Supreme Court Act 1981, to which there is no relevant contrary provision in this context apart from the practice direction, and to CPR r 44.3(2), which provides that generally payment of costs follows the outcome.

64 As to the costs of preparing and filing an acknowledgment of service and of preparation for attendance at any oral renewal hearing, Mr Corner submitted that paragraph 8.6 of the practice direction does not apply to the former, and there is, therefore, no bar to their recovery, whatever the true effect of that guidance as to other costs of and occasioned by an oral renewal hearing. He supported the generality of the note in *Civil Procedure* as to the effect of Collins J's judgment in *In re Leach* and disagreed with Moses J's view in para 83 (see para 57 above) that a successful defendant should not generally have such costs. He maintained that it followed from *In re Leach* that a defendant who has filed an acknowledgment of service and has indicated, pursuant to CPR r 54.8(4), his intention to contest the claim, with a summary of his grounds for doing so, and who has succeeded on that "pleading" at the permission stage, should have his costs. He submitted in relation to these and the costs of attendance at such a hearing, that, as a general principle, it is unfair that a defendant should have to bear the costs of putting forward his objections, in whatever form, to an unarguable claim; it is simply a waste of public funds.

65 In relation to the costs of filing an acknowledgment of service, Mr Corner drew important support from the Pre-Action Protocol for Judicial Review, adopted with effect from 4 March 2002. It provides, save in urgent cases, for a letter before claim and for the proposed defendant to respond setting out his stance and, if contrary to the proposed claim, summarising the reasons for it. Failure by the proposed defendant to respond could be met with a sanction in costs. He submitted that an intending claimant could, therefore, follow this procedure without fear of incurring liability for a defendant's costs and, if a defendant provided no adequate response, without fear of being ordered to pay the costs of a defendant's acknowledgment of service. He pointed out that Mount Cook and the council had followed the protocol and submitted, therefore, that

A there was no reason why the council should have to bear the costs of the wholly avoidable need of preparation of an acknowledgment of service.

66 However, in respect of all the council's costs, including those of filing the acknowledgment of service and of attendance at the oral renewal hearing, he adopted the judge's reasoning that, in any, event there were exceptional circumstances, or "special features" as the judge called them, justifying an exercise of his discretion to award them all against Mount B Cook. On this partly alternative submission, he relied on the following circumstances: (1) Mount Cook's claim was hopeless; (2) given the calibre of its legal representation, it must have known beforehand that it was hopeless; (3) it had had effectively the benefit of a full, substantive, hearing of the claim; (4) it was well able to bear the costs; and (5) in the circumstances it was right that the council, as a public body, should have all its costs of C resisting the claim.

Conclusions

67 The starting point, it seems to me, is the general provision in section 51 of the 1981 Act that, subject to any contrary statutory enactment or rules of court, costs are in the discretion of the court. There is no D statutory provision or rule of court, in particular in CPR Pt 54, removing that discretion. The nearest to intrusions on it are the general rule in CPR r 44.3(2) that costs, where awarded, should generally follow the event, and, in this context, paragraphs 8.5 and 8.6 of the practice direction. The CPR are made by the Civil Procedure Rules Committee and are made by statutory instrument pursuant to sections 1 and 2 of the Civil Procedure Act 1997. Practice directions in general supplement the CPR and are made by the head E of the appropriate Division of the High Court under his or her inherent jurisdiction. They are recognised by the 1997 Act, and, for example in section 5(1) and Schedule 1, paragraphs 3 and 6, may in certain circumstances have the effect of provisions that could otherwise be made by way of CPR: see also CPR r 8.1(6)(b). Such circumstances do not apply to paragraphs 8.5 and 8.6 of the Judicial Review Practice Direction. I use the word "recognised" deliberately, for I doubt whether it is correct to assert as a F generality, as do the authors of the *Queen's Bench Guide: a guide to the working practices of the Queen's Bench Division within the Royal Courts of Justice*, May 2000 ed, in para 1.3.2, that practice directions are made "pursuant" to statute or that they have the same authority as the CPR. As the guide itself asserts, in the case of any conflict between the two, the CPR prevails. To that already somewhat cumbrous and confusing three-tier G hierarchy of rules and guidance for civil litigants—statutory, CPR and practice directions—there has now, as I have indicated, been added a fourth in the case of judicial review in the form of the pre-action protocol.

68 As to practice directions, what is important is that all involved in the areas of administration of justice for which they provide, including claimants in judicial review proceedings, should be able to rely upon them as an indication of the normal practice of the courts unless and until amended. H However, they differ from the CPR that: (1) in general they provide guidance that should be followed, but do not have binding effect; and (2) they should yield to the CPR where there is clear conflict between them.

69 The guidance given in paragraph 8.6 of the Judicial Review Practice Direction that a claimant at a permission hearing will not generally be

ordered to pay the costs of a defendant or any other party who attends does not conflict with CPR Pt 54, which, as I have said, makes no direct provision as to the award of costs at the permission stage. And, it is, as Mr Steel pointed out, of a piece with the practice of the courts under the old RSC Ord 53 when read with section 51 of the 1981 Act: see e g *R v Honourable Society of the Middle Temple, Ex p Bullock* [1996] ELR 349, 359C, per Brooke J; and McCracken and Jones [2002] JR 4. But the great change wrought by CPR Pt 54 over RSC Ord 53 is the requirement of service of the initial claim and of a response by an acknowledgment of service, and of an entitlement—not an obligation—on the part of the proposed defendant, if he has so responded, to attend and make representations at any oral renewal hearing.

70 This new regime may be compared and contrasted with the provisions of CPR Pt 52 and the Part 52 Practice Direction, which provide, in the case of applications for permission to appeal, for applicants to notify respondents of the application. However, unless the court otherwise directs, they do not oblige respondents to do anything unless and until notified that permission has been given. And, while clearly envisaging that an order for costs may be made at a permission hearing, they do not in terms seek to guide or fetter that discretion: see *Jolly v Jay* [2002] EWCA Civ 277 at [48], per Brooke LJ, giving the judgment of the court. See also and compare the regime for seeking permission to proceed with a statutory planning appeal against the dismissal of an enforcement notice under section 289 of the 1990 Act, in respect of which this court held in *R v Secretary of State for Wales, Ex p Rozhon* (1993) 91 LGR 667 that, as a general rule, the costs of the application should follow the event.

71 Here, the express discouragement in paragraph 8.6 of the practice direction of the award of costs against claimants, whether successful or unsuccessful, at the permission stage is, in my view, a clear indication, in conformity with the Bowman report recommendation that, if a defendant or other interested party chooses to attend and contest the grant of permission at a renewal hearing, the hearing should be short and not a rehearsal for, or effectively a hearing of, the substantive claim. The objects of the obligation on a defendant to file an acknowledgment of service setting out where appropriate his case are: (1) to assist claimants with a speedy and relatively inexpensive determination by the court of the arguability of their claims; and (2) to prompt defendants—public authorities—to give early consideration to and, where appropriate, to fulfil their public duties. It would frustrate those objects to discourage would-be claimants from seeking justice by the fear of a penalty in costs if they do not get beyond the permission stage or to clog up that stage with full-scale rehearsals of what would be the substantive hearing of a claim if permission is granted. Thus, not only the statutory scheme, as supplemented by the practice direction and the pre-action protocol, but also the public law context, is different from that governing the generality of civil law proceedings, differences that suggest the need for, and intention to provide, a different costs regime in such cases.

72 Accordingly, I see no good reason in law or practice why the guidance given in paragraph 8.6 of the practice direction should not be followed in this and all cases in which a defendant or other interested party to a judicial review claim files an acknowledgment of service and attends and successfully resists it a permission hearing. Generally—that is, save in

A exceptional circumstances—costs of and occasioned by such attendance should not be awarded against a claimant.

73 It follows that judges before whom contested permission applications are listed, and in their conduct of them, should discourage long hearings and/or the filing by both parties of voluminous documentary evidence for consideration at them. In short, they should not allow the court to be sucked into lengthy and fully argued oral hearings that transform the B process from an inquiry into arguability into that of a rehearsal for, or effectively, an expedited and full hearing of the substantive claim.

74 But where does that general rule leave *In re Leach* [2001] CP Rep 97 and the costs of filing an acknowledgment of service upon which a defendant has relied and followed through by successfully resisting the claim at the permission stage? As I have said, as a result of the note in *Civil Procedure*, C the ruling of Collins J in *In re Leach* appears to be regarded as an authority for the proposition that a defendant who successfully resists the grant of permission should, as a matter of principle, be entitled to his costs, not only of filing an acknowledgment of service as required by CPR r 54.8, but also of his preparation for and attendance at any permission hearing. In fact, as Mr Steel observed, there was no permission hearing in that case. The only hearing was of an application by an unopposed defendant for an order that D the claimant should pay his costs of filing of the acknowledgment of service. It was not, therefore, a case that would have engaged paragraph 8.6 of the practice direction since, when read with paragraph 8.5, the guidance that a defendant or other interested party attending an oral permission hearing should not generally have his costs clearly applies only to the costs of and occasioned by his attendance at such a hearing. Given that distinction and E the absence of any such constraint on the narrower issue before him, there was, with respect, good sense in Collins J's recourse to the obligation in CPR r 54.8 to file an acknowledgment as a reason for requiring a claimant to pay the costs of that initial procedural step. Different considerations, which he did not have to consider, would obviously apply to the costs of a permission hearing at which a defendant who intends "to take part in the judicial review" chooses voluntarily to attend and orally to argue his case.

F 75 There are obviously some practical aspects of the *Leach* approach that, as Collins J indicated in paras 17–19 of his judgment, require urgent attention. I would suggest in the first instance that the Civil Procedure Rules Committee may wish to look at the matter (if it has not already begun to do so), with a view to amendment of CPR r 54.8 or to prompting an amendment of the practice direction, to provide appropriate machinery for G claiming and the award of costs of filing an acknowledgment of service and for contesting such an award in an appropriate case.

76 Accordingly, I would hold the following to be the proper approach to the award of costs against an unsuccessful claimant, and to the relationship of the obligation in CPR r 54.8 on a defendant "who wishes to take part in the judicial review" to file an acknowledgment of service with the general rule in paragraph 8.6 of the practice direction that a successful H defendant at an oral permission hearing should not generally be awarded costs against the claimant:

(1) The effect of *In re Leach*, certainly in a case to which the pre-action protocol applies and where a defendant or other interested party has complied with it, is that a successful defendant or other party at the

permission stage who has filed an acknowledgment of service pursuant to CPR r 54.8 should generally recover the costs of doing so from the claimant, whether or not he attends any permission hearing.

(2) The effect of paragraph 8.6, when read with paragraph 8.5, of the practice direction, in conformity with the long-established practice of the courts in judicial review and the thinking of the Bowman report giving rise to the CPR Pt 54 procedure, is that a defendant who attends and successfully resists the grant of permission at a renewal hearing should not generally recover from the claimant his costs of and occasioned by doing so.

(3) A court, in considering an award against an unsuccessful claimant of the defendant's and/or any other interested party's costs at a permission hearing, should only depart from the general guidance in the practice direction if he considers there are exceptional circumstances for doing so.

(4) A court considering costs at the permission stage should be allowed a broad discretion as to whether, on the facts of the case, there are exceptional circumstances justifying the award of costs against an unsuccessful claimant.

(5) Exceptional circumstances may consist in the presence of one or more of the features in the following non-exhaustive list: (a) the hopelessness of the claim: (b) the persistence in it by the claimant after having been alerted to facts and/or of the law demonstrating its hopelessness; (c) the extent to which the court considers that the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends—a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one; and (d) whether, as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had, in effect, the advantage of an early substantive hearing of the claim.

(6) A relevant factor for a court, when considering the exercise of its discretion on the grounds of exceptional circumstances, may be the extent to which the unsuccessful claimant has substantial resources which it has used to pursue the unfounded claim and which are available to meet an order for costs.

(7) The Court of Appeal should be slow to interfere with the broad discretion of the court below in its identification of factors constituting exceptional circumstances and in the exercise of its discretion whether to award costs against an unsuccessful claimant.

77 Such an approach seems to me to accord with public policy in providing ready access to the courts by individuals or bodies seeking relief from and/or to draw attention to actual or threatened transgressions of the law by public bodies, whilst, in exceptional cases protecting those bodies and the public that funds them from unnecessary, burdensome and costly substantive litigation. If properly and consistently applied by the courts, I can see nothing about it that would, as Mr Steel suggested, undermine the fairness and probity of judicial review as a means of control of the administration or run contrary to article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Lord Woolf's civil justice reforms or the adoption of them in this context in the Bowman report.

78 It follows, in my view, that Moses J erred in applying the same test to the council's costs of filing the acknowledgment of service as to its costs of

A and occasioned by attendance and contesting the arguability of the claim at the permission hearing. He could and should have applied the discretion available to him to award such costs on the *Leach* principle and untrammelled by the guidance in paragraph 8.6 of the practice direction. And, whilst—for want of access to the report of *In re Leach*, at the time of giving judgment—he might have been misled by the note in *Civil Procedure* as to the breadth of Collins J's ruling, it is plain from his reasoning in B paras 82–85 (see para 57 above) that he exercised the paragraph 8.6 discretion in the conventional way by looking for—in his words—"special features" before departing from the general course of making no order in attendance costs cases. Against the argument that he might not have applied the same rigorous test—in para 82—to the costs of the oral hearing as to those of preparation for it, in particular the filing of the acknowledgment of C service—para 83—his reasoning was essentially the same for both. In his emphasis on the latter—in paras 83–84—he was merely responding, albeit unnecessarily, to the approach of Collins J to the costs of filing an acknowledgment of service.

79 It follows, in my view, that Moses J, regardless of his possible misunderstanding of the breadth of *In re Leach*, identified and applied the correct test under paragraph 8.6 to the council's costs of and occasioned by D its attendance at the permission hearing. He was entitled to order Mount Cook to pay the whole of those costs, within the range of discretion still permitted to him by that provision and the conventional long-standing practice of the courts to which it gave expression. What amounts to exceptional circumstances for not following the general rule may vary considerably according to the circumstances of the case, including the E strength or weakness of the application and the respective conduct and circumstances of the parties. Here, the combination of the hopelessness of the application, the clear intention and ability of Mount Cook to deploy its considerable resources in attempting to use this public law route of exerting commercial pressure on Redevco to surrender its lease, and its use of those resources effectively to secure a full hearing of the claim at the application F stage were clearly capable of amounting to exceptional circumstances for not following the general rule—and the judge was entitled so to find.

80 As to the hopelessness of the application, against Mr Steel's suggestion that it cannot have been that hopeless given this court's grant of permission on a renewed oral application, I should mention: (1) that in refusing permission on the papers, I was of, and expressed, the view that the claim was hopeless, either because of the immateriality of Mount Cook's G alternative proposal or because of its lack of weight; (2) that, on the oral renewal of application for permission, the court, unlike at this substantive hearing, only heard counsel for Mount Cook; and (3) that, at that hearing, both members of the court were of the same view, but decided, with some hesitation, to grant permission having regard also to the claimed uncertainty of the law as to the materiality of alternative proposals in planning applications and as to costs at the permission stage. Having now heard both H sides, I am confident that I was right first time; it was, as Ouseley J made plain in his reasons for refusal on paper, a hopeless claim.

81 As to the considerable resources of Mount Cook and its deployment of them in initiating and persevering with the claim, I should add that, in my view, there are different considerations when a court is asked to consider the

grant of costs against an unsuccessful claimant at the permission stage from those as to discretionary refusal of relief at the end of a substantive hearing: see para 47 above. At the refusal of permission stage the claimant has lost on the merits and, as in any other case where the award of costs lies in the discretion of the court, the conduct and motive of an unsuccessful party in having pursued unmeritorious litigation for some collateral aim is capable of being a relevant consideration to the exercise of that discretion. And, as a result of the refusal of permission, there is no underlying legal justification for the claim to intrude on the manner of its exercise.

82 And, as to the full hearing point, had the matter continued to a substantive hearing with the same result, Mount Cook would undoubtedly have had to pay the council's costs. There is force in Mr Corner's argument that it would have been unfair for Mount Cook to have had the benefit of fully testing its case and to have lost without any risk of exposure to the council's costs. In addition, there is a public interest in considering the award of costs against an unsuccessful claimant in such circumstances if, as was clearly intended by the Bowman report and the framers of paragraphs 8.5 and 8.6 of the practice direction, lengthy contested permission hearings of this sort should be discouraged.

83 Accordingly, I would reject all of the grounds relied on by Mount Cook and would dismiss its appeal and its claim for judicial review.

CLARKE LJ

84 I agree.

JONATHAN PARKER LJ

85 I also agree.

Order accordingly.

SALLY DOBSON, Barrister

A King's Bench Division

Rex (Substation Action Save East Suffolk Ltd) *v* Secretary of State for Business, Energy and Industrial Strategy

B **[2022] EWHC 3177 (Admin)**

2022 Nov 15, 16; Dec 13 Lang J

Planning — Development — National policy statement — Development consent granted for wind turbine projects comprising offshore and onshore development — Whether development consent orders unlawful — Whether flood risk from surface water properly taken into account — Whether insufficient weight given to harm to heritage assets — Whether sufficient consideration of alternative sites — Planning Act 2008 (c 29), ss 104, 114 — Infrastructure Planning (Decision) Regulations 2010 (SI 2010/305), reg 3 — National Planning Policy Framework (2021), paras 161, 162 — Overarching National Policy Statement for Energy EN-1, Pts 4.4, 5.7

C

D

The interested parties applied for development consent orders under section 114 of the Planning Act 2008[1] to authorise nationally significant infrastructure projects consisting of two proposed offshore wind farms with associated onshore and offshore development, including the construction of a new National Grid substation and two project substations. In determining the application the Secretary of State was required by section 104 of the 2008 Act to "have regard" to any relevant national policy E statement and to determine the application in accordance with it unless a relevant exception applied. Following an examination process, the Secretary of State accepted the examining authorities' recommendation to grant the development consent orders, concluding that the benefits of the proposed development, which would provide significant additional renewable energy generation consistent with climate change targets and the national energy policy statements, on balance outweighed its negative impacts. The claimant, a company formed by concerned local residents, challenged F the development consent orders as being unlawful by reason of the location of the onshore part of the development, in that, inter alia: (i) contrary to the requirement in the National Planning Policy Framework[2], the Overarching National Policy Statement for Energy EN-1[3] ("NPS EN-1") and associated guidance, the "sequential test" had not been properly applied to the risk of surface water flooding at the stage of site selection, in relation to which the examining authorities' finding of flood risk from surface water made it necessary for the interested parties to demonstrate that G no other sites with lower flood risk were available; (ii) the Secretary of State had relied on an unlawful interpretation of regulation 3 of the Infrastructure Planning (Decisions) Regulations 2010[4] concerning the preservation of heritage assets and

[1] Planning Act 2008, s 104: see post, para 32.
S 114(1): "When the Secretary of State has decided an application for an order granting H development consent, the Secretary of State must either— (a) make an order granting development consent, or (b) refuse development consent."

[2] National Planing Policy Framework, paras 161, 162: see post, para 59.

[3] Overarching National Policy Statement for Energy EN-1, Pt 4.4: see post, para 216. Pt 5.7: see post, paras 53–57.

[4] Infrastructure Planning (Decisions) Regulations 2010, reg 3: see post, para 94.

had consequently failed to give sufficient weight in the planning balance to the heritage harm identified in the examining authorities' report; and (iii) having regard to section 104 of the 2008 Act and the policy guidance in NPS EN-1, and given the substantial adverse effects at the chosen development site and the interested parties' reliance on the benefits of the proposed development, the Secretary of State had erred in failing to consider alternative sites in which to situate the project substations and National Grid substation.

On the claim for judicial review—

Held, dismissing the claim, (1) that the express aim of planning policy under the National Planning Policy Framework and Overarching National Policy Statement for Energy EN-1 was to ensure that the risks of flooding from all sources, including surface water, were taken into account at all stages of the planning process; that, while the specific guidance on the application of the "sequential test" only referred to the location of projects in different flood zones, such zones were designated on the basis of the risk of fluvial flooding, not surface water or other sources of flooding, and thus were not a sufficient means of assessing surface water flood risks; that in the absence of any further direction in the Framework or policy guidance as to how surface water flooding was to be factored into the sequential approach, it was a matter of judgment for an applicant, and ultimately the decision-maker, as to how flood risks from other sources such as surface water ought to be factored into the sequential test; that, further, the application of the sequential test did not require that, where some surface water risk existed, it needed to be positively demonstrated that there were no other sites with lower surface water flood risk reasonably available for the development; and that, in the present case, the Secretary of State having accepted that all sources of flooding had been considered and that the applicants had applied the sequential test as part of site selection, it had been a lawful exercise of planning judgment for him to conclude that, in all the circumstances, the flood risk assessment was appropriate for the development (post, paras 53, 58, 64, 65, 76, 81, 82).

(2) That, while the duty to "have regard" in regulation 3 of the Decisions Regulations 2010 required the decision-maker to take into account the "desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses", it did not include the higher duty found in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to treat a finding of heritage harm as a consideration to which the decision-maker ought to give "considerable importance and weight" when assessing the planning balance; and that, therefore, as the weight to be accorded to the heritage harm was not prescribed by statute, the Secretary of State had not been required by law to apply "considerable importance and weight" to it in the planning balance (post, paras 104, 111, 112).

Howell v Secretary of State for Communities and Local Government [2014] EWHC 3627 (Admin) applied.

(3) That there was no principle of law that in any case where the beneficial effects of a proposed development outweighed its adverse effects, the existence of alternative sites became a mandatory material consideration; that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances; that, while a requirement to consider alternative sites might arise from the terms of a national policy statement, paragraph 4.4.3 of National Policy Statement EN-1 only required alternatives that were not main alternatives studied by an applicant to be considered to the extent that they were "important and relevant", in accordance with section 104(2) of the Planning Act 2008; that the circumstances at the interested parties' chosen site could not be characterised as wholly exceptional; that the examining authorities, having considered the issues and evidence including whether a different site offered viable connection alternatives, had been entitled

A lawfully to conclude, as a matter of planning judgment, that the alternative sites were not "important and relevant" and that the legal and policy framework for the considerations of alternatives had been met; and that the Secretary of State's decision agreeing with that analysis and those conclusions disclosed no public law error (post, paras 211, 214, 215, 219, 222, 223, 225–230).

Langley Park School for Girls v Bromley London Borough Council [2010] 1 P & CR 10, CA, *R (Mount Cook Land Ltd) v Westminster City Council* [2017] PTSR B 1166, CA and *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2022] PTSR 74 considered.

The following cases are referred to in the judgment:

Bath Society v Secretary of State for the Environment [1991] 1 WLR 1303; [1992] 1 All ER 28; 89 LGR 834, CA

C *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19

East Northamptonshire District Council v Secretary of State for Communities and Local Government [2014] EWCA Civ 137; [2015] 1 WLR 45, CA

Hale Bank Parish Council v Halton Borough Council [2019] EWHC 2677 (Admin)

Howell v Secretary of State for Communities and Local Government [2014] EWHC 3627 (Admin)

D *Langley Park School for Girls v Bromley London Borough Council* [2009] EWCA Civ 734; [2010] 1 P & CR 10, CA

Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] ICR 291; [1993] 1 All ER 42, HL(E)

R (Jones) v North Warwickshire Borough Council [2001] EWCA Civ 315; [2001] 2 PLR 59, CA

E *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2017] PTSR 1166, CA

R (Pearce) v Secretary of State for Business, Energy and Industrial Strategy [2021] EWHC 326 (Admin); [2022] Env LR 4

R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport [2021] EWHC 2161 (Admin); [2022] PTSR 74

R (Scarisbrick) v Secretary of State for Communities and Local Government [2017] EWCA Civ 787, CA

F *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin); [2020] PTSR 240, DC; sub nom *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52; [2021] PTSR 190; [2021] 2 All ER 967, SC(E)

R (Swire) v Secretary of State for Housing, Communities and Local Government [2020] EWHC 1298 (Admin); [2020] Env LR 29

South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141; [1992] 2 WLR 204; [1992] 1 All ER 573; 90 LGR 201, HL(E)

G

The following additional cases were cited in argument or referred to in the skeleton arguments:

Barker Mill Estates (Trustees of the) v Test Valley Borough Council [2016] EWHC 3028 (Admin); [2017] PTSR 408

City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 320; [2021] 1 WLR 5761, CA

H *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2017] EWCA Civ 893; [2018] PTSR 88, CA

Gillespie v First Secretary of State [2003] EWCA Civ 400; [2003] Env LR 30, CA

Hutchings, In re [2019] UKSC 26; [2020] NI 801, SC(NI)

London Historic Parks and Gardens Trust v Minister of State for Housing [2022] EWHC 829 (Admin); [2022] JPL 1196

Mordue v Secretary of State for Communities and Local Government [2015] EWCA Civ 1243; [2016] 1 WLR 2682, CA
Newcastle upon Tyne City Council v Secretary of State for Levelling Up, Housing and Communities [2022] EWHC 2752 (Admin)
Newick (Baroness Cumberlege of) v Secretary of State for Communities and Local Government [2018] EWCA Civ 1305; [2018] PTSR 2063, CA
R v Rochdale Metropolitan Borough Council, Ex p Milne [2000] Env LR 1
R (Champion) v North Norfolk District Council [2015] UKSC 52; [2015] 1 WLR 3710; [2015] 4 All ER 169; [2015] LGR 593, SC(E)
R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 1303 (Admin); [2020] PTSR 1709
R (Hampton Bishop Parish Council) v Herefordshire Council [2014] EWCA Civ 878; [2015] 1 WLR 2367, CA
R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3; [2023] AC 255; [2022] 2 WLR 343; [2022] 4 All ER 95, SC(E)
R (Wright) v Forest of Dean District Council [2019] UKSC 53; [2019] 1 WLR 6562; [2020] 2 All ER 1, SC(E)
R (Zurich Assurance Ltd (trading as Threadneedle Property Investments)) v North Lincolnshire Council [2012] EWHC 3708 (Admin)
Secretary of State for Communities and Local Government v Allen [2016] EWCA Civ 767, CA
Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1986) 53 P & CR 293

CLAIM for judicial review

By a claim form, and pursuant to section 118 of the Planning Act 2008, the claimant, Substation Action Save East Suffolk Ltd, sought judicial review of the decision dated 31 March 2022 of the defendant, the Secretary of State for Business, Energy and Industrial Strategy, on applications by the interested parties, East Anglia One North Ltd and East Anglia Two Ltd, to grant two development consent orders under section 114 of the 2008 Act for the construction of two offshore wind farms with associated onshore and offshore development. On 1 July 2022 Lang J, considering the matter on the papers, granted permission to proceed with the claim. The grounds of challenge were, inter alia, that the Secretary of State had: (1) erred in his assessment of the adequacy of the interested parties' flood risk assessment, and in his overall assessment of flood risk, in that the sequential test, properly applied, required assessment of all sources of flooding at the stage of site selection and the Secretary of State had instead applied the sequential test at the stage of design after site selection and had otherwise acted irrationally in reaching his conclusions on flood risk; and (2) substantively adopted the examining authorities' reasoning on heritage harm which was based on an unlawful interpretation of the Infrastructure Planning (Decisions) Regulations 2010, which consequently infected his analysis of heritage harm; alternatively, while purporting to give heritage harm "considerable importance and weight", such weight was not reflected in the overall planning balance, which followed the examining authorities' analysis, and which unlawfully attributed only "medium" weight to the issue, contrary to the legal requirement. The full grounds of challenge are set out in the judgment, post, paras 8–14.

The facts are stated in the judgment, post, paras 1–7, 15–28.

Richard Turney and *Charles Bishop* (instructed by *Richard Buxton Solicitors, Cambridge*) for the claimant.

Mark Westmoreland Smith and *Jonathan Welch* (instructed by *Treasury Solicitor*) for the Secretary of State.

Hereward Phillpot KC and *Hugh Flanagan* (instructed by *Shepherd and Wedderburn LLP*) for the interested parties.

The court took time for consideration.

13 December 2022. **LANG J** handed down the following judgment.

1 The claimant applies for judicial review, pursuant to section 118 of the Planning Act 2008 ("PA 2008"), of the decisions of the defendant, dated 31 March 2022, to make two development consent orders ("DCOs") under section 114 PA 2008 for the construction, respectively, of the East Anglia ONE North and East Anglia TWO Offshore Wind Farms with associated onshore and offshore development.

2 The two DCOs are the East Anglia ONE North Offshore Wind Farm Order 2022 (SI 2022/432) ("EA1N") and the East Anglia TWO Offshore Wind Farm Order 2022 (SI 2022/433) ("EA2").

3 Both DCOs authorise two nationally significant infrastructure projects ("NSIPs"): a generating station and associated grid connection and substation, and a National Grid NSIP comprising substation, cable sealing ends and pylon realignment. The project substations, and the National Grid NSIP, are to be located at Friston in Suffolk.

4 The decisions were preceded by an examination process, held simultaneously in respect of both applications, by the examining authorities ("the ExA") which culminated in two separate reports ("ERs"), both recommending the grant of development consent. The defendant accepted the recommendation of the ExA in two separate decision letters ("DL") which accompanied the decisions. The reports and the DLs do not differ materially on the issues to which this claim relates. Therefore, to avoid duplication, references to the ER and DL in respect of EA1N stand also as references to the ER and DL for EA2.

5 The claimant is a company limited by guarantee formed by a number of local residents in East Suffolk to represent communities in the area. There are significant concerns in the local community about the onshore location of the connection of the development to the National Grid. It is this element of the development which is the subject of the claim; the claimant does not object to the offshore wind farms.

6 The two interested parties ("the applicants") were the respective applicants for the DCOs. They are wholly owned by ScottishPower Renewables, part of the Scottish Power group of companies, which is part of the Spanish utility group Iberdrola.

7 I granted permission to apply for judicial review, on the papers, on 1 July 2022.

Grounds of challenge

8 The claimant's grounds of challenge may be summarised as follows:

9 *Ground 1: Flood risk (as amended)*. The defendant erred in his assessment of the adequacy of the applicants' flood risk assessment ("FRA"), and in his overall assessment of flood risk, in that:

(i) the sequential test, properly applied, requires assessment of all sources of flooding at the stage of site selection;

(ii) the defendant did not properly apply the sequential test at the stage of site selection, rather than at the stage of design after site selection; and

(iii) he otherwise acted irrationally in reaching his conclusions on flood risk.

10 *Ground 2: Heritage assets*. The defendant's conclusions as to heritage harm were unlawful in that:

(i) he substantively adopted the ExA's reasoning which was based on an unlawful interpretation of the Infrastructure Planning (Decisions) Regulations 2010 ("the Decisions Regulations 2010"), which consequently infected the defendant's analysis of heritage harm; and/or

(ii) while the defendant purported to give heritage harm "considerable importance and weight", such weight was not reflected in the overall planning balance, which followed the ExA's analysis, and which unlawfully attributed only "medium" weight, contrary to the legal requirement.

11 *Ground 3: Noise*. The defendant erred in his treatment of noise impacts, in that he:

(i) failed to take into account that his conclusions on noise necessarily entailed a conflict with paragraph 5.11.9 of National Policy Statement ("NPS") EN-1;

(ii) relied on the imposition of a requirement which was in all the circumstances unreasonable in that it had not been shown to be workable; and/or

(iii) failed to take into account the impact of noise from switchgear/circuit breakers in the National Grid substation.

12 *Ground 4: Generating capacity*. The defendant:

(i) failed to take into account representations made by the claimant in respect of the need to secure a minimum generating capacity in the DCO and/or failed to give reasons for rejecting those representations; and/or

(ii) took into account an irrelevant consideration, namely the total proposed generating capacity of the development when this was not secured by a requirement in the DCO.

13 *Ground 5: Cumulative effects*. The defendant irrationally excluded from consideration the cumulative effects of known plans for extension (outlined in the applicants' "Extension of National Grid Substation Appraisal"), through the addition of other projects to connect at the same location in Friston, and failed to take into account environmental information relating to those projects, in breach of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572) ("the EIA Regulations 2017").

14 *Ground 6: Alternative locations*. The defendant failed to consider whether there were alternative locations in which to situate the project substations and National Grid NSIP. He was required to do so in the face of the substantial planning objections to the proposals, including in relation to heritage harm and flood risk.

A *Factual background*

15 The applications for development consent comprised an offshore element and an onshore element. The offshore element is for the construction and operation of up to 67 (in the case of EA1N) and 75 (in the case of EA2) wind turbine generators ("WTGs"); together with up to four offshore B electrical platforms; an offshore construction, operation and maintenance platform; a meteorological mast; inert-array cables linking the WTGs to each other and to the offshore electrical platforms; platform link cables; and up to two export cables to take the electricity generated by the WTGs from the offshore electrical platforms to landfall. The proposed generating capacity was up to 800MW for EA1N and up to 900MW for EA2.

16 The onshore works in respect of both applications include landfall C connection works north of Thorpeness in Suffolk, with underground cables running to a new onshore substation located next to Friston, Suffolk. The onshore works also include the realignment of existing overhead power lines and the construction of a new National Grid substation at Friston. The proposal is therefore that the Friston site will accommodate a substation for each of EA1N and EA2, and a new National Grid NSIP comprising a D substation and cable sealing ends connected to the realigned overhead lines. The site at Friston extends to 46.28 hectares.

17 This development is part of a wider series of offshore wind farms known as the East Anglia Zone. The projects in the East Anglia Zone are the East Anglia ONE and East Anglia THREE wind farms (consented in 2014 and 2017 respectively), as well as EA1N and EA2, and future wind farm projects still to be brought forward. When the East Anglia E ONE and East Anglia THREE wind farms were consented, the expectation (and requirement) was that their grid connection route (from Bawdsey to an existing National Grid substation at Bramford) would be used for the subsequent projects. Initially, both EA1N and EA2 had grid connection agreements for connection at Bramford and the East Anglia ONE project was required to make provision for future cable ducting to serve other wind F farms. However, because of design changes, there was insufficient space within the consented cable corridor for the future connection of EA1N and EA2.

18 The projects in the East Anglia Zone were split between ScottishPower and Vattenfall, with ScottishPower retaining the EA1N, EA2 and East Anglia THREE projects. This resulted in a review by the National Grid of the G proposed onshore connection site for EA1N and EA2 in 2017.

19 The applicants' environmental statement ("ES"), Chapter 4, described the process of "Site Selection and Assessment of Alternatives". The National Grid owns the electricity transmission network. The Electricity Act 1989 requires the National Grid to develop and maintain an efficient, co-ordinated and economical system of electricity transmission, whilst having regard to environmental matters. Similar requirements are contained in NPS EN-1 H and the National Grid Guidelines. The selection of a site for connection to the National Grid is undertaken through the National Grid Electricity System Operator ("NGESO") Connection and Infrastructure Options Note ("CION") process. The CION process is the mechanism used to evaluate potential options for connecting to the transmission system, having regard

to capital and operational cost, and technical, regulatory, environmental, planning and deliverability factors.

20 The CION review considered all realistic possible connection points, namely:

(i) Bramford 400kV substation;
(ii) Sizewell 400kV substation;
(iii) Leiston 400kV substation; and
(iv) Norwich Main 400kV substation.

21 The CION process concluded that a substation in the Leiston area was the most economic and efficient connection, having regard to environmental and programme implications. The reasons for this decision were summarised in the National Grid's "Note on the assessment of options for the connection of ScottishPower Renewables East Anglia ONE North and East Anglia TWO offshore wind farms to the National Grid network".

22 As a result of the CION process, the applicants considered themselves bound to search for a location for a new substation and related infrastructure in the Leiston area. Chapter 4 of the ES explained, in respect of the "Onshore Substations Site Selection Study Area" that the location of the substations "is driven by the agreement with National Grid for a grid connection in the vicinity of Sizewell and Leiston" (at para 101). On 21 December 2017, the grid connection agreement was made between the applicants and the National Grid which identified the location of the onshore connection to the National Grid as "in or around Leiston".

23 The site selection process within the Leiston area was described at section 4.9 of Chapter 4 of the ES. Seven potential zones were identified, including Friston. The process comprised (i) scoping; (ii) a Red/Amber/Green ("RAG") assessment; (iii) a Phase 2 consultation; (iv) Site Selection Expert Topic Group; (v) Phase 3 consultation; and (vi) Phase 3.5 consultation. There followed a preliminary environmental information report ("PEIR") and a FRA.

24 The applicants selected Zone 7, Friston, as the onshore site. The ER summarised the reasons for the selection of Friston as follows:

> "25.3.13 In summary terms, the Friston location was viewed by the Applicant as the preferred substation location. Its main benefits were seen as its location outside the Suffolk Coast and Heaths AONB, the availability of a substantial body of land in which all substation infrastructure could be co-located, taking significant screening benefits from established woodland and the avoidance of possible conflicts with construction, operation or decommissioning in relation to Sizewell nuclear power stations. The disbenefit of the location was the need for a significant additional extent of onshore cable corridor to connect it to the landfall location."

25 The applications for development consent were submitted on 25 October 2019. They were accepted for examination under section 55 PA 2008 on 22 November 2019, and the ExA was appointed on 13 December 2019. The simultaneous examination of EA1N and EA2 took place from October 2020 to July 2021. The ExA reported to the defendant on 6 October 2021.

26 The ExA's overall conclusions were as follows:

A "*28.4 Overall conclusion on the case for development*

"28.4.1. Because the Proposed Development meets specific relevant Government policy set out in NPS EN-1, NPS EN-3, and NPS EN-5, as a matter of law, a decision on the application in accordance with any relevant NPS (PA 2008 S104(2)(a) and S104(3)) also indicates that development consent should be granted unless a relevant consideration arising from the following subsections of the Act (PA 2008 S104(4) to (8)) applies.

B

"28.4.2. The Proposed Development is also broadly compliant with the MPS. Regard has been had to the Marine Plans in force and again, the Proposed Developments broadly comply (PA 2008 section 104(2)(aa)).

28.4.3. Regard has been had to the LIR (PA 2008 section 104(2)(b),

C to prescribed matters (PA 2008 section 104(2)(c)) and to all other important and relevant policy (including but not limited to the Development Plan) and to other important and relevant matters identified in this Report (PA 2008 section 104(2)(d).

"28.4.4. In the ExA's judgement, the benefits of the Proposed Development at the national scale, providing highly significant additional renewable energy generation capacity in scalar terms and in

D a timely manner to meet need, are sufficient to outweigh the negative impacts that that have been identified in relation to the construction and operation of the Proposed Development at the local scale. The local harm that the ExA has identified is substantial and should not be underestimated in effect. Its mitigation has in certain key respects been found to be only just sufficient on balance. However, the benefits of the

E Proposed Development principally in terms of addressing the need for renewable energy development identified in NPS EN-1 outweigh those effects. In terms of PA 2008 section 104(7) the ExA specifically finds that the benefits of the Proposed Development do on balance outweigh its adverse impacts.

"28.4.5. In reaching this conclusion, the ExA has had regard to the

F effect of the Proposed Development cumulatively with the other East Anglia development and with such other relevant policies and proposals as might affect its development, operation or decommissioning and in respect of which there is information in the public domain. In that regard, the ExA observes that effects of the cumulative delivery of the Proposed Development with the other East Anglia development on the transmission connection site near Friston are so substantially

G adverse that utmost care will be required in the consideration of any amendments or additions to those elements of the Proposed Development in this location. This ExA does not seek to fetter the discretion of future decision-makers about additional development proposals at this location. However, it can and does set out a strong view that the most substantial and innovative attention to siting, scale,

H appearance and the mitigation of adverse effects within design processes would be required if anything but immaterial additional development were to be proposed in this location.

"28.4.6. In relation to this conclusion, the ExA observes that particular regard needs to be had at this location to flood and drainage effects (where additional impermeable surfaces within the

existing development site have the potential to affect the proposed flood management solution), to landscape and visual impacts and to impacts on the historic built environment, should these arise from additional development proposals in the future.

"28.4.7. The ExA concludes overall that, for the reasons set out in the preceding chapters and summarised above, the SoS should decide to grant development consent.

"28.4.8. The ExA acknowledges that this is a conclusion that may well meet with considerable dismay amongst many local residents and businesses who became IPs and contributed positively and passionately to the Examination across a broad range of matters and issues. To them the ExA observes that their concerns are real and that the planning system provided a table to which they could be brought. However, highly weighty global and national considerations about the need for large and timely additional renewable energy generating capacity to meet need and to materially assist in the mitigation of adverse climate effects due to carbon emissions have to be accorded their due place in the planning balance. In the judgment of the ExA, these matters must tip a finely balanced equation in favour of the decision to grant development consent for the Proposed Development."

27 The defendant undertook further consultation following receipt of the ERs. The DL, dated 31 March 2022, set out the defendant's conclusions as follows:

"27. *The Secretary of State's consideration of the planning balance*

"27.1 The ExA considered all the merits and disbenefits of the Proposed Development and concluded that in the planning balance, the case for development consent has been made and that the benefits of the Proposed Development would outweigh its adverse effects [ER 28.4.4]. The ExA judged that the benefits of the Proposed Development at the national scale, providing highly significant additional renewable energy generation capacity in scalar terms and in a timely manner to meet the need for such development (as identified in NPS EN-1), are sufficient to outweigh the negative impacts that have been identified in relation to the construction and operation of the Proposed Development at the local scale. In reaching this conclusion, the ExA had regard to the effect of the Proposed Development cumulatively with the East Anglia TWO development and with such other relevant policies and proposals as might affect its development, operation or decommissioning and in respect of which there is information in the public domain. The Secretary of State agrees with the ExA's overall conclusion on the case for development.

"27.2 Because of the existence of three relevant NPSs, NPS EN-1, NPS EN-3, and NPS EN-5, the Secretary of State is required to determine this application against section 104 of the Planning Act 2008. Section 104(2) requires the Secretary of State to have regard to:

• any local impact report (within the meaning given by section 60(3)),

• any matters prescribed in relation to development of the description to which the application relates, and

• any other matters which the Secretary of State thinks are both important and relevant to the decision.

"27.3 The Secretary of State acknowledges and adopts the substantial weight the ExA gives to the contribution to meeting the need for electricity generation demonstrated by NPS EN-1 and its significant contribution towards satisfying the need for offshore wind [ER 28.4.4]. He further notes that the ExA has identified that the Proposed Development would be consistent with the Climate Change Act 2008 (2050 Target Amendment) Order 2019 which amended the Climate Change Act 2008 to set a legally binding target of 100% below the 1990 baseline. The Secretary of State notes that the designated energy NPSs continue to form the basis for decision-making under the Planning Act 2008. The Secretary of State considers, therefore, that the ongoing need for the Proposed Development is established as it is in line with the national need for offshore wind as part of the transition to a low carbon economy, and that granting the Order would be compatible with the amendment to the Climate Change Act 2008.

"27.4 After reviewing the ExA Report, the Secretary of State has reached the following conclusions on the weight of other individual topics to be taken forward into the planning balance: flooding & drainage—high negative weighting; landscapes & visual amenity—medium negative weighting; onshore historic environment—medium negative weighting; seascapes—neutral weighting; onshore ecology—low negative weighting; coastal processes—neutral weighting; onshore water quality & resources; noise and vibration—medium negative weighting; air quality, light pollution, and impacts on human health —low negative weighting; transport & traffic—medium negative weighting; socio-economic effects onshore—medium positive weighting; land use effects—medium negative weighting; offshore ornithology—medium negative weighting; marine mammals—low negative weighting; other offshore biodiversity—low negative weighting; marine physical effects & water quality—low negative weighting; offshore historic environment—low negative weighting; offshore socio-economic & other effects—neutral weighting; good design—low negative weighting; other overarching matters—neutral weighting.

"27.5 Following his consideration of the various submissions relating to the potential for the OTNR to provide an alternative onshore grid connection for the Proposed Development (see paras 3.13 to 3.19 above), the Secretary of State has decided to accord limited weight to the OTNR against granting the Proposed Development.

"27.6 The Secretary of State has considered all the merits and disbenefits of the Proposed Development and concluded that, on balance, the benefits of the Proposed Development outweigh its negative impacts.

"27.7 For the reasons given in this letter, the Secretary of State considers that there is a strong case for granting development consent for the East Anglia ONE North Offshore Wind Farm. Given the national need for the development, as set out in the relevant NPSs, the Secretary of State does not believe that this is outweighed by the Proposed Development's potential adverse impacts, as mitigated by the proposed terms of the Order.

"27.8 The Secretary of State has also considered the proposal supported by multiple interested parties that there should be a split

decision or partial consent in respect to proposed onshore and offshore development, but after careful consideration agrees with the ExA's position that the East Anglia ONE North and East Anglia TWO developments are entitled to be evaluated under the policy framework that is in place rather than the prospect of a new one, and that the great weight to be accorded to delivering substantial and timely carbon and climate benefits also weighs in favour of not taking split decisions driven by other elements of further possible policy changes.

"27.9 The Secretary of State has therefore decided to accept the ExA's recommendation to make the Order granting development consent [ER 28.4.7] to include modifications set out below in section 29 below. In reaching this decision, the Secretary of State confirms regard has been given to the ExA's Report, the joint LIR submitted by East Suffolk Council and Suffolk County Council, the NPSs, and to all other matters which are considered important and relevant to the Secretary of State's decision as required by section 104 of the Planning Act 2008. The Secretary of State confirms for the purposes of regulation 3(2) of the ExA Planning (Environmental Impact Assessment) Regulations 2017 that the environmental information as defined in regulation 2(1) of those Regulations has been taken into consideration."

28 Thus, the defendant reached the same conclusion as the ExA, though not always for the same reasons. Overall, whereas the ExA found the competing factors to be "finely balanced" the defendant concluded there was "a strong case" for a development consent order to be made.

Statutory and policy framework

Planning Act 2008

29 A detailed account of the PA 2008 was provided by the Supreme Court in *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 190, paras 19–38.

30 By section 31 PA 2008, development consent is required for development "to the extent that the development is or forms part of a nationally significant infrastructure project".

31 Sections 41 to 50 P A 2008 apply before an application for a DCO is made, and impose duties to consult on an applicant.

32 Section 104 PA 2008 applies when the Secretary of State is determining an application for a DCO in relation to which an NPS has effect:

"104 *Decisions in cases where national policy statement has effect*

"(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.

"(2) In deciding the application the Secretary of State must have regard to— (a) any national policy statement which has effect in relation to development of the description to which the application relates (a 'relevant national policy statement'), (aa) the appropriate marine policy documents (if any), determined in accordance with section 59 of the Marine and Coastal Access Act 2009, (b) any local impact report (within the meaning given by section 60(3)) submitted to the Secretary of State

A before the deadline specified in a notice under section 60(2), (c) any matters prescribed in relation to development of the description to which the application relates, and (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.

"(3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that B one or more of subsections (4) to (8) applies.

"(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.

"(5) This subsection applies if the Secretary of State is satisfied that C deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

"(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.

"(7) This subsection applies if the Secretary of State is satisfied that D the adverse impact of the proposed development would outweigh its benefits.

"(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.

"(9) For the avoidance of doubt, the fact that any relevant national E policy statement identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying."

33 Section 104(2)(d) PA 2008 allows the Secretary of State to exercise a judgment on whether he should take into account any matters which are relevant, but not mandatory, material considerations in line with the F established case law on relevant considerations: *R (Pearce) v Secretary of State for Business, Energy and Industrial Strategy* [2022] Env LR 4, per Holgate J at para 11.

34 Section 104(3) PA 2008 "requires an application for a DCO to be decided in accordance with any relevant NPS judged as a whole, recognising that the statement's policies (or their application) may pull in different G directions and that, for example, a breach of a single policy does not carry the consequence that the proposal fails to accord with the NPS": *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 (Divisional Court) at para 329 (undisturbed on appeal).

National Policy Statements

H **35** NPSs are made by the Secretary of State under section 5 PA 2008.

36 The Overarching NPS for Energy (EN-1) was made in July 2011. It sets out the wider national policy for energy and applies in combination with the other technology-specific NPSs. Part 3 of EN-1 establishes the need for new energy NSIPs. Part 4 of EN-1 sets out principles applicable to assessing DCO applications. Paragraph 4.1.2 sets a presumption in favour of

granting consent to applications for energy NSIPs, unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused, and subject to the provisions of the PA 2008.

37 The NPS Renewable Energy Infrastructure (EN-3) was made in July 2011. It provides further policies on assessment and technology-specific information on offshore wind.

38 The NPS Electricity Networks Infrastructure (EN-5) was made in July 2011. It provides further policies on a variety of impacts, including assessment of noise.

39 The Department for Business, Energy and Industrial Strategy ran a consultation on revised NPSs that support decisions on major energy infrastructure from 6 September to 29 November 2021. This included a draft revised EN-1, EN-3 and EN-5. Draft revised EN-1 was taken into account as an emerging policy on the heritage issues.

40 The principles applicable to the interpretation of national planning policy in the context of the PA 2008 were summarised by Lindblom LJ in *R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787 at [19]:

> "The court's general approach to the interpretation of planning policy is well established and clear (see the decision of the Supreme Court in *Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983, in particular the judgment of Lord Reed JSC at paras 17–19). The same approach applies both to development plan policy and statements of government policy (see the judgment of Lord Carnwath JSC in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, paras 22–26). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see para 18 of Lord Reed's judgment in *Tesco Stores v Dundee City Council*). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see para 18 of Lord Reed JSC's judgment in *Tesco Stores v Dundee City Council*). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paras 24–26 of Lord Carnwath JSC's judgment in *Hopkins Homes*). It is not suggested that those basic principles are inapplicable to the NPS—notwithstanding the particular statutory framework within which it was prepared and is to be used in decision-making."

National Planning Policy Framework and Planning Practice Guidance

41 At the time the applications were submitted, the relevant version of the National Planning Policy Framework ("the Framework") was dated 19 February 2019. A revised version of the Framework was published on 20 July 2021, after the examination had closed (on 6 July 2021) but before the ExA completed its report.

A **42** The Planning Practice Guidance ("PPG") is relevant to ground 1 (flood risk). The claimant referred to authorities on the status of the PPG which confirm that it is merely practice guidance, not policy.

Ground 1: Flood risk (as amended)

Claimant's submissions

B **43** The claimant submitted that the defendant erred in his assessment of the adequacy of the applicants' FRA, and in his overall assessment of flood risk. The sequential test, properly applied, required assessment of all sources of flooding at the stage of site selection. Here it was applied at the stage of design after site selection. Therefore the defendant was wrong to conclude that the sequential test was met, and his conclusions on flood risk C were irrational.

44 The claimant pleaded in its reply to the summary grounds of resistance (para 2) that "for the purposes of the claim the court can simply proceed on the basis that all parties are agreed that to find compliance with the sequential test, it was necessary to find that the IPs had demonstrated that there were no sites available for the substation with lower pluvial flood risk".

D **45** The claimant accepted that the applicants applied the sequential test to the risk of fluvial flooding, but complained that it had not been applied to the risk of surface water flooding, which the ExA found to be a high risk (ER 6.5.5). The ExA wrongly concluded that the applicants had complied with the requirements of NPS EN-1. The ExA also erred in finding that the revised Framework, issued in July 2021, had introduced a policy change by requiring that the sequential approach should be applied to all sources of flood risk, E including surface water. This was not a change in policy; NPS EN-1, Planning Policy Statement 25 ("PPS 25") and the earlier editions of the Framework all required assessment of surface water flood risks, using the sequential test.

46 The claimant submitted that the defendant should have clearly stated in the DL that the ExA's view that there had been a policy change was mistaken. He did not do so.

F **47** Further, the defendant erred in accepting the applicants' case that the FRA was appropriate and applied the sequential test as part of its site selection, in the absence of any updated guidance on how the sequential test should be applied to all sources of flooding, including surface water. The sequential test had to be applied to the risk of surface water flooding at site selection stage, which the applicants failed to do. The reliance upon the PPG was misplaced as it is merely practice guidance, supplemental to the G Framework, and does not have the force of policy.

Defendant and applicants' submissions

48 The defendant and applicants submitted that the claimant's submissions proceeded on the twin misapprehensions that the defendant thought the sequential test did not require consideration of surface water H flood risks and that the applicants did not assess surface water flood risks. Both were incorrect. The defendant did not adopt the ExA's view that the Framework (July 2021 edition) introduced a change in policy; he accepted the view of the applicants that it was a clarification of existing policy.

49 The defendant did not misinterpret national policy and guidance on the sequential test. It was relevant that the guidance in the PPG had not

been updated. The policy and guidance is not prescriptive as to how surface water flooding risk is to be taken into account in applying the sequential test. It leaves a significant element of judgment to the decision-maker, as emphasised in PPG para 7-034 (Ref ID 7-034-20140306). That judgment can only be challenged on public law grounds, such as irrationality.

50 The claimant's assertion in para 2 of the reply to the summary grounds (set out at para 44 above) was incorrect; that was not what the policy or guidance stated.

51 Contrary to the claimant's submissions, the applicants' FRA did take account of the surface water flood risk, as well as fluvial flood risk. On the basis of the evidence, the defendant was entitled to conclude, as a matter of planning judgment, that the applicants had complied with current policy and guidance on the sequential test as part of site selection, and therefore the FRA was appropriate for the application (DL 4.28). This conclusion could not be characterised as irrational.

Conclusions

Policies and guidance

52 The policies on flood risk in force at the date of the ExA's report were NPS EN-1 and the Framework (February 2019 edition). The PPG contained practice guidance on the application of the Framework. The only difference by the time of the defendant's decision was that the July 2021 edition of the Framework had been issued.

53 NPS EN-1 provides, at paragraph 5.7.3, that the aims of planning policy on development and flood risk are to ensure that flood risk from all sources of flooding is taken into account at all stages in the planning process to avoid inappropriate development in areas at risk of flooding.

54 Paragraph 5.7.4 refers to sources of flooding, other than rivers and the sea, for example, surface water.

55 Paragraph 5.7.5 sets out the minimum requirements for FRAs. Paragraph 5.7.6 of EN-1 states that further guidance on what will be expected from FRAs is found in the Practice Guide accompanying PPS 25 or successor documents (thus, now, the Framework and PPG).

56 Under the heading "Decision making", EN-1 provides:

> "5.7.9 In determining an application for development consent, the IPC should be satisfied that where relevant:
>
> • the application is supported by an appropriate FRA;
>
> • the Sequential Test has been applied as part of site selection;
>
> • a sequential approach has been applied at the site level to minimise risk by directing the most vulnerable uses to areas of lowest flood risk;
>
> • the proposal is in line with any relevant national and local flood risk management strategy [Footnote 114: As provided for in section 9(1) of the Flood and Water Management Act 2010.];
>
> • priority has been given to the use of sustainable drainage systems (SuDs) (as required in the next paragraph on National Standards); and
>
> • in flood risk areas the project is appropriately flood resilient and resistant, including safe access and escape routes where required, and that any residual risk can be safely managed over the lifetime of the development. …

A "5.7.12 The IPC should not consent development in Flood Zone 2 in England … unless it is satisfied that the sequential test requirements have been met. It should not consent development in Flood Zone 3 or Zone C unless it is satisfied that the Sequential and Exception Test requirements have been met …"

57 The policy then goes on to set out the sequential test:

B "*The Sequential Test*

"5.7.13 Preference should be given to locating projects in Flood Zone 1 in England … If there is no reasonably available site in Flood Zone 1 … then projects can be located in Flood Zone 2 … If there is no reasonably available site in Flood Zones 1 or 2 then nationally significant energy infrastructure projects can be located in Flood Zone 3 or Zone C subject C to the Exception Test. Consideration of alternative sites should take account of the policy on alternatives set out in section 4.4 above."

58 I agree with the submission made by the defendant and the applicants that, whilst NPS EN-1 refers to all sources of flooding, the specific guidance on the application of the sequential test only refers to the location of projects in different flood zones. Whilst flood zones are plainly relevant, they are D designated on the basis of the risk of fluvial flooding, not surface water or other sources of flooding, and so they are not a sufficient means of assessing surface water flood risks. Therefore, it is a matter of judgment for an applicant, and ultimately the decision-maker, as to how to apply the sequential test to flood risks from other sources, such as surface water.

59 The policy on assessment of flood risks in the Framework (July 2021) E provides:

"*Planning and flood risk*

"159. Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without F increasing flood risk elsewhere.

"160. Strategic policies should be informed by a strategic flood risk assessment, and should manage flood risk from all sources. They should consider cumulative impacts in, or affecting, local areas susceptible to flooding, and take account of advice from the Environment Agency and other relevant flood risk management authorities, such as lead local G flood authorities and internal drainage boards.

"161. All plans should apply a sequential, risk-based approach to the location of development—taking into account all sources of flood risk and the current and future impacts of climate change—so as to avoid, where possible, flood risk to people and property. They should do this, and manage any residual risk, by:

(a) applying the sequential test and then, if necessary, the exception H test as set out below;

(b) safeguarding land from development that is required, or likely to be required, for current or future flood management;

(c) using opportunities provided by new development and improvements in green and other infrastructure to reduce the causes and impacts of flooding, (making as much use as possible of natural flood

management techniques as part of an integrated approach to flood risk management); and

(d) where climate change is expected to increase flood risk so that some existing development may not be sustainable in the long-term, seeking opportunities to relocate development, including housing, to more sustainable locations.

"162. The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding.

"163. If it is not possible for development to be located in areas with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied. The need for the exception test will depend on the potential vulnerability of the site and of the development proposed, in line with the Flood Risk Vulnerability Classification set out in Annex 3.

"164. The application of the exception test should be informed by a strategic or site-specific flood risk assessment, depending on whether it is being applied during plan production or at the application stage. To pass the exception test it should be demonstrated that: a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; and b) the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.

"165. Both elements of the exception test should be satisfied for development to be allocated or permitted.

"166. Where planning applications come forward on sites allocated in the development plan through the sequential test, applicants need not apply the sequential test again. However, the exception test may need to be reapplied if relevant aspects of the proposal had not been considered when the test was applied at the plan-making stage, or if more recent information about existing or potential flood risk should be taken into account.

"167. When determining any planning applications, local planning authorities should ensure that flood risk is not increased elsewhere. Where appropriate, applications should be supported by a site-specific flood-risk assessment. [Footnote 55: A site-specific flood risk assessment should be provided for all development in Flood Zones 2 and 3. In Flood Zone 1, an assessment should accompany all proposals involving: sites of 1 hectare or more; land which has been identified by the Environment Agency as having critical drainage problems; land identified in a strategic flood risk assessment as being at increased flood risk in future; or land that may be subject to other sources of flooding, where its development would introduce a more vulnerable use.] Development should only be allowed in areas at risk of flooding where, in the light of this assessment (and the sequential and exception tests, as applicable) it can be demonstrated that:

A (a) within the site, the most vulnerable development is located in areas of lowest flood risk, unless there are overriding reasons to prefer a different location;

(b) the development is appropriately flood resistant and resilient such that, in the event of a flood, it could be quickly brought back into use without significant refurbishment;

B (c) it incorporates sustainable drainage systems, unless there is clear evidence that this would be inappropriate;

(d) any residual risk can be safely managed; and

(e) safe access and escape routes are included where appropriate, as part of an agreed emergency plan.

"168. Applications for some minor development and changes of use [Footnote 56: This includes householder development, small non-
C residential extensions (with a footprint of less than 250m^2) and changes of use; except for changes of use to a caravan, camping or chalet site, or to a mobile home or park home site, where the sequential and exception tests should be applied as appropriate.] should not be subject to the sequential or exception tests but should still meet the requirements for site-specific flood risk assessments set out in footnote 55.

D "169. Major developments should incorporate sustainable drainage systems unless there is clear evidence that this would be inappropriate. The systems used should:

(a) take account of advice from the lead local flood authority;

(b) have appropriate proposed minimum operational standards;

(c) have maintenance arrangements in place to ensure an acceptable standard of operation for the lifetime of the development; and

E (d) where possible, provide multifunctional benefits."

60 Paragraphs 160–165 apply to plan-making and site allocation by local planning authorities. Paragraphs 166–169 apply to applications for planning permission or development consent. The reference to "taking into account *all sources* of flood risk" in paragraph 161 (emphasis added) is the clarification
F that was not in the previous edition of the Framework.

61 The PPG, at para 7.019, provides:

"*The aim of the Sequential Test*

"*What is the aim of the Sequential Test for the location of development?*

G "The Sequential Test ensures that a sequential approach is followed to steer new development to areas with the lowest probability of flooding. The flood zones as refined in the Strategic Flood Risk Assessment for the area provide the basis for applying the Test. The aim is to steer new development to Flood Zone 1 (areas with a low probability of river or sea flooding). Where there are no reasonably available sites in Flood Zone 1, local planning authorities in their
H decision making should take into account the flood risk vulnerability of land uses and consider reasonably available sites in Flood Zone 2 (areas with a medium probability of river or sea flooding), applying the Exception Test if required. Only where there are no reasonably available sites in Flood Zones 1 or 2 should the suitability of sites in Flood Zone 3 (areas with a high probability of river or sea flooding) be considered,

taking into account the flood risk vulnerability of land uses and applying the Exception Test if required." A

"Within each flood zone, surface water and other sources of flooding also need to be taken into account in applying the sequential approach to the location of development.

"Paragraph: 019 Reference ID: 7–019–20140306

"Revision date: 06 03 2014" B

62 Para 7.033 of the PPG provides:

"*Applying the Sequential Test to individual planning applications*

"*How should the Sequential Test be applied to planning applications?*

"See advice on the sequential approach to development and the aim of the sequential test. C

"The Sequential Test does not need to be applied for individual developments on sites which have been allocated in development plans through the Sequential Test, or for applications for minor development or change of use (except for a change of use to a caravan, camping or chalet site, or to a mobile home or park home site).

"Nor should it normally be necessary to apply the Sequential Test to development proposals in Flood Zone 1 (land with a low probability of flooding from rivers or the sea), unless the Strategic Flood Risk Assessment for the area, or other more recent information, indicates there may be flooding issues now or in the future (for example, through the impact of climate change). D

"For individual planning applications where there has been no sequential testing of the allocations in the development plan, or where the use of the site being proposed is not in accordance with the development plan, the area to apply the Sequential Test across will be defined by local circumstances relating to the catchment area for the type of development proposed. For some developments this may be clear, for example, the catchment area for a school. In other cases it may be identified from other Local Plan policies, such as the need for affordable housing within a town centre, or a specific area identified for regeneration. For example, where there are large areas in Flood Zones 2 and 3 (medium to high probability of flooding) and development is needed in those areas to sustain the existing community, sites outside them are unlikely to provide reasonable alternatives. E F

"When applying the Sequential Test, a pragmatic approach on the availability of alternatives should be taken. For example, in considering planning applications for extensions to existing business premises it might be impractical to suggest that there are more suitable alternative locations for that development elsewhere. For nationally or regionally important infrastructure the area of search to which the Sequential Test could be applied will be wider than the local planning authority boundary. G H

"Any development proposal should take into account the likelihood of flooding from other sources, as well as from rivers and the sea. The sequential approach to locating development in areas at lower flood risk should be applied to all sources of flooding, including development in an area which has critical drainage problems, as notified to the local

planning authority by the Environment Agency, and where the proposed location of the development would increase flood risk elsewhere.

"See also advice on who is responsible for deciding whether an application passes the Sequential Test and further advice on the Sequential Test process available from the Environment Agency (flood risk standing advice).

"Paragraph: 033 Reference ID: 7–033–20140306.

"Revision date: 06 03 2014."

63 Para 7.034 of the PPG provides:

"*Who is responsible for deciding whether an application passes the Sequential Test?*

"It is for local planning authorities, taking advice from the Environment Agency as appropriate, to consider the extent to which Sequential Test considerations have been satisfied, taking into account the particular circumstances in any given case. The developer should justify with evidence to the local planning authority what area of search has been used when making the application. Ultimately the local planning authority needs to be satisfied in all cases that the proposed development would be safe and not lead to increased flood risk elsewhere.

"Paragraph: 034 Reference ID: 7–034–20140306.

"Revision date: 06 03 2014."

64 It is apparent that the Framework and the PPG require surface water flooding to be taken into account when considering location of development, as part of the sequential approach, but, beyond that, there is no further direction as to exactly how surface water flooding is to be factored into the sequential approach. Policy and guidance is not prescriptive in this regard. Therefore it will be a matter of judgment for the applicant and the decision-maker (as envisaged in para 7.034 of the PPG) as to how to give effect to the policy appropriately, in the particular circumstances of the case.

65 I accept the submission of the defendant and applicants that neither the policies nor the guidance support the claimant's submission that the application of the sequential test means that, where there is some surface water flood risk, it must be positively demonstrated that there are no sites reasonably available for the development with lower surface water flood risk.

66 I was not assisted by the claimant's references to cases on other policies in other contexts (eg *Hale Bank Parish Council v Halton Borough Council* [2019] EWHC 2677 (Admin)).

The decisions

67 The defendant conducted a post-examination consultation on the updates to the Framework, as recommended by the ExA. It was summarised at DL 4.27, as follows:

"*Updates to the National Planning Policy Framework: Post Examination Consultation*

"4.27 The Secretary of State consulted on the issue of updates to the NPPF on 2 November 2021 and 20 December 2021, the key responses are summarised below:

• SCC (the Lead Local Flood Authority)—the changes to the NPPF would require the Applicant to undertake a Sequential Test, and if necessary, an Exception Test. However, SCC acknowledge that as the PPG has not been updated, it is not clear how the Sequential and Exception Tests would be applied.

• ESC—states that the reference in the updated NPPF has the potential to have important implications for the East Anglia ONE North and East Anglia TWO projects. However, they also acknowledge that as the PPG has not been updated, it is not clear how the Sequential and Exception Tests would be applied.

• SASES—consider that it is clear from the Applicant's submissions that surface water and ground water were not taken into account during the site selection process and, consequently, the Sequential test was not properly applied. Additionally, SASES consider that the updates to the NPPF do not impose any new policy requirement but rather reinforce the existing requirements. SASES also reiterated that they considered the infiltration testing conducted by the Applicant was insufficient and had concerns about the Applicant's approach to applying the Sequential Test. Overall, SASES considered that because of the defects of the Applicant's approach, that policy requirements had not been met.

• The Applicant—acknowledges that the updated NPPF is more explicit in the use of the term 'any source' of flooding but note that the criteria for the assessment and application of the Sequential Test remains unchanged, and that the PPG does not provide any criteria for the assessment of suitability of a location to determine whether a development is appropriate or not. The Applicant also highlighted:

(i) they have considered all sources of flooding in the design of the Proposed Development;

(ii) the substation site and National Grid infrastructure have been located in an area at low risk of surface water flooding;

(iii) appropriate mitigation measures have been adopted to address any remaining surface water flood risk concerns;

(iv) SCC had already given surface water flooding equal weighting when reviewing the Proposed Development's assessment of flood risk throughout the examination;

(v) that the emphasis in the updated NPPF to move away from hard engineered flood solutions is not considered by the Applicant to be a fundamental change that would alter their proposed drainage strategy or adoption of SuDS measures;

(vi) that the extensive landscape planting proposed would reduce the speed of surface water runoff compared to that currently experienced, as well as soil erosion and silt levels in runoff;

(vii) modelling undertaken for the Friston Surface Water Flood Study15 confirms that surface water flooding within Friston primarily results from surface water flow from a number of locations unrelated to the substation site; and

(viii) by attenuating surface water and ensuring a controlled discharge rate from the site there is no increase in flood risk to the surrounding area, specifically Friston."

68 The defendant then set out his conclusions on this issue at DL 4.28:

A "4.28 The Secretary of State notes that all sources of flooding have been considered by the Applicant in the design of the Proposed Development, he also notes the surface water mitigation measures which the Applicant has proposed to address flood risk concerns. Furthermore, the Secretary of State has considered all the consultation responses relevant to the NPPF updates and, noting that the guidance on how the Sequential Test should be applied in respect of all sources of flooding has not been updated, is satisfied that the Applicant has (as it is currently defined) applied the Sequential Test as part of site selection. As such, the Secretary of State considers that the FRA is appropriate for the Application."

B

69 In my view, the defendant did not adopt the ExA's view, expressed at ER 6.5.7, that the July 2021 edition of the Framework introduced a policy change. The defendant aptly described the change in wording as a clarification (DL 4.25). As the applicants submitted in their consultation response, "the updated NPPF is more explicit in the use of the term 'any source' of flooding" (DL 4.27).

C

70 I consider that the defendant was correct to note, at DL 4.28, that the guidance on applying the sequential test (within the PPG) had not been updated to reflect the clarification in the Framework. That was a relevant observation to make in circumstances where he had to consider how the sequential test should be applied to surface water flood risks, which was not provided for in the policy. Therefore, I reject the claimant's criticism of the defendant's approach as one which unduly elevated the status of the PPG.

D

71 There was ample evidence of the applicants' assessment of surface water flood risk before the defendant. Although the RAG assessment did not consider surface water flood risks, the FRA, provided as part of the PEIR (Appendix 20.1), noted that within each flood zone, surface water and other sources of flooding also need to be considered when applying the sequential approach to the location of each project (para 125) and went on to consider surface water flood risk and conclude that there were no unacceptable impacts (paras 171–172).

E

F

72 Chapter 4 of the ES on Site Selection and Assessment referred to the PEIR and its FRA. The FRA that was submitted as part of the ES also considered surface water flood risk (paras 142, 191–196).

73 Further information was submitted during the examination by the applicants including the Outline Operational Drainage Management Plan (5 July 2021), which further considered flood risk in Friston (see paras 59–76) and a strategy to address any surface water issues (section 9).

G

74 On 25 March 2021, the applicants submitted a "Flood Risk and Drainage Clarification Note" and on 6 May 2021, the applicants submitted comments on the claimant's deadline 9 submissions.

75 In response to the Secretary of State's consultation of 2 November 2021, the applicants submitted an explanation on 30 November 2021 of how surface water flood risk had been taken into account in site selection. It summarised the policy and guidance and stated:

H

"23. While the applicants have considered all sources of flooding, in the absence of any criteria as to how this should be implemented, they have sought to address the potential risk from surface water flooding by

locating the onshore substations and National Grid infrastructure in an area at low risk of surface water flooding, and by adopting appropriate mitigation measures within the design to address any remaining surface water flood risk concerns.

"24. In considering the revised wording it is also noted that SCC (as the LLFA) had already given surface water flooding equal weighting when reviewing the Projects' assessment of flood risk throughout the DCO examinations and prior to the publication of the updated NPPF.

"25. All development sites have an element of potential surface water flood risk and any development that changes the surface of a site so that it is more impermeable will need to address this matter through the application of appropriate mitigation measures. There is greater emphasis in the updated NPPF on 'making as much use as possible of natural flood management techniques as part of an integrated approach to flood risk management', which is part of the shift in focus away from hard engineering solutions. However, this is not considered to be a fundamental change that would alter the Projects' Drainage Strategy or the adoption of the proposed SuDS measures. It should also be noted that the extensive landscape planting being proposed as part of the Projects' landscape mitigation strategy would reduce the speed of surface water runoff compared to that currently experienced, as well as soil erosion and silt levels in runoff. On this basis, the landscape mitigation strategy will afford opportunities for further flood mitigation over and above that already included within the concept drainage design.

"26. Regarding surface water flooding, the onshore substation and National Grid infrastructure locations were reviewed against the Environment Agency's surface water flood risk mapping and identified as being predominantly located in an area at very low risk of surface water flooding. Furthermore, the National Grid substation location was selected in full cognisance of the presence of a shallow surface water flow route (comprising approximately 4cm of water depth during a 1 in 100 year storm event), noting that such features can be diverted, and their continued conveyance ensured using well established and proven techniques. A commitment to this is made within the OODMP (REP13–020), along with a commitment to offset any reduction in volume relating to other existing surface water features in the vicinity of the substation locations.

"27. Additionally, a review of the modelling undertaken for the Friston Surface Water Flood Study (BMT, 2020) further confirmed that the surface water conveyance routes onsite do not constitute a significant risk to the onshore substations or National Grid infrastructure, and that the risk falls well below the lowest hazard."

76 The application of the relevant policy and guidance was a matter of planning judgment for the defendant. I do not consider that the defendant's approach discloses any error of law.

77 At DL 4.1 to 4.5, the defendant summarised the relevant policies, clearly recording that all sources of flood risk were to be taken into account at all stages, and that development was directed away from areas at highest risk of flooding by the application of the sequential test.

78 The defendant then set out a summary of the applicants' case at DL 4.6 to 4.12. All above ground structures, including the substations, would be located in Flood Zone 1. Some subterranean development (cabling) would be located in Flood Zones 2 and 3 where it is required to pass under existing watercourses on its route to the sea. The sequential test had been applied in accordance with the Framework and the PPG, and the development would be sequentially located in Flood Zone 1, in accordance with the current guidance on the sequential test in the PPG that "The aim is to steer new development to Flood Zone 1" (para 7.019).

79 At DL 4.27, the defendant noted the applicants' position that all sources of flooding had been assessed with regard to the onshore substations, and that the wider area, including the village of Friston, would not be adversely affected. The substation and infrastructure were located in an area at low risk of surface water flooding, and appropriate mitigation measures had been adopted to address any remaining surface water flood risk concerns, by attenuating surface water and ensuring a controlled discharge rate from the site. There was no increase in flood risk to the surrounding area, specifically Friston.

80 The claimant relied upon the ExA's finding that "Friston should be considered an area at high risk of surface water flooding" (ER 6.5.5). However, this finding related to the village of Friston (see ER 6.5.7, 6.5.20 and 6.5.27), not the site of the proposed development which lies outside the village, and is at low risk of surface water flooding. Modelling undertaken for the Friston Surface Water Flood Study confirmed that surface water flooding within Friston primarily resulted from surface water flow from a number of locations unrelated to the substation site.

81 At DL 4.28, the defendant accepted that all sources of flooding had been considered, and he was satisfied that the applicants had applied the sequential test as part of site selection. He concluded that the FRA was appropriate for the application, in all the circumstances. In my judgment, this was a lawful exercise of planning judgment, in which the defendant recognised that the relevant policies and guidance required surface water flood risks to be taken into account when considering the location of development, as part of the sequential approach, but left it to the decision-maker to determine when and how that should be done. The defendant's conclusion cannot be properly characterised as irrational.

82 Therefore, for the reasons set out above, ground 1 does not succeed.

Ground 2: Heritage assets

Claimant's submissions

83 The claimant submitted that the defendant's conclusions as to heritage harm were unlawful in that:

(i) he substantively adopted the ExA's reasoning which was based on an unlawful interpretation of the Decisions Regulations 2010, which consequently infected the defendant's analysis of heritage harm; and/or

(ii) while the defendant purports to give heritage harm "considerable importance and weight", such weight was not reflected in the overall planning balance, which follows the ExA's analysis, and which unlawfully attributed only "medium" weight, contrary to the legal requirement.

84 The claimant contended that regulation 3 of the Decisions Regulations 2010 should be interpreted and applied in a similar way to the statutory regime under the Planning (Listed Buildings and Conservation Areas) Act 1990 ("LBCA 1990") and the Town and Country Planning Act 1990 ("TCPA 1990"). This was the approach taken by Holgate J in *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2022] PTSR 74.

85 The defendant's position was inconsistent with paragraph 5.9.21 of draft emerging NPS EN-1 and the defendant's own position in the decision on the Thurrock Flexible Generation Plant Development and the Norfolk Vanguard Offshore Wind Farm Order 2022 in which he accorded identified heritage harm considerable importance and weight.

86 Although the defendant said, at DL 6.30, that he gave "considerable importance and weight" to heritage harm, he did not refer to this when undertaking the planning balance, and only gave the heritage harm a "medium" weighting, whereas it should have been given a "high" weighting as a matter of law.

Defendant's and applicants' submissions

87 The defendant and applicants submitted that there was a clear distinction between the statutory duty in regulation 3 of the Decisions Regulations 2010 and the statutory regime under the LBCA 1990 and the TCPA 1990. Therefore the case law and policy that has developed under the LBCA 1990 could not simply be read across into cases under the PA 2008.

88 In *Howell v Secretary of State for Communities and Local Government* [2014] EWHC 3627 (Admin), the court held, per Cranston J at paras 45–46, that the duty to "have special regard" in the LBCA 1990 was not to be equated with the duty to "have regard" in other statutes concerning planning and environmental matters.

89 This point did not arise nor was it decided by Holgate J in the case of *Stonehenge*. Furthermore, Holgate J made no finding that the LBCA 1990 learning and case law could simply be read across to the PA 2008.

90 The proper interpretation of the legislation could not be altered by a draft policy document, or by the other DCO decisions referred to by the claimant.

91 The defendant plainly did have regard to the desirability of preserving any affected building, its setting, or any features of special or architectural or historic interest it possesses: see ER 8.6.2 and DL 6.1 and 6.30.

92 The weight to be attached to the heritage harm was a matter of planning judgment, not mandated by statute.

93 Alternatively, if there was a legal duty to give the heritage harm considerable importance and weight, that was what the defendant did at DL 6.30. In the light of this statement, the medium weighting given to the heritage harm in the planning balance has to be read as meaning "considerable" or "significant". The weight given to other factors cannot affect the weight given to heritage harm.

Conclusions

The tests to be applied

94 The legal test to be applied by the defendant on application for a DCO is set out in regulation 3(1) of the Decisions Regulations 2010 which provides:

> "(1) When deciding an application which affects a listed building or its setting, the Secretary of State must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.
>
> "(2) When deciding an application relating to a conservation area, the Secretary of State must have regard to the desirability of preserving or enhancing the character or appearance of that area.
>
> "(3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the Secretary of State must have regard to the desirability of preserving the scheduled monument or its setting."

95 The policy to be applied by the defendant in NPS EN-1, which provides:

> "5.8.13 The [Secretary of State] should take into account the desirability of sustaining and, where appropriate, enhancing the significance of heritage assets, the contribution of their settings and the positive contribution they can make to sustainable communities and economic vitality …
>
> "5. 8.14 There should be a presumption in favour of the conservation of designated heritage assets and the more significant the designated heritage asset, the greater the presumption in favour of its conservation should be …"

96 I refused the claimant permission to refer to the speech of the Under-Secretary of State when introducing the Decisions Regulations 2010 in the House of Lords as, in my judgment, the test in *Pepper v Hart* [1993] AC 593, 640B–C, was not met. The wording of regulation 3 is not ambiguous, nor does it lead to an absurdity.

97 There is a separate statutory regime, applicable to applications for planning permissions under the TCPA 1990, which is set out in the LBCA 1990, at section 66(1):

> "66 *General duty as respects listed buildings in exercise of planning functions*
>
> "(1) In considering whether to grant planning permission … for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

> "(2) Without prejudice to section 72, in the exercise of the powers of appropriation, disposal and development (including redevelopment) conferred by the provisions of sections 232, 233 and 235(1) of the principal Act, a local authority shall have regard to the desirability of preserving features of special architectural or historic interest, and in particular, listed buildings."

98 The duty under section 66(1) LBCA 1990 was considered by the Court of Appeal in *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2015] 1 WLR 45. Sullivan LJ held that there was an overarching statutory duty to treat a finding of harm to a listed building as a consideration to which the decision-maker must give "considerable importance and weight" when carrying out the balancing exercise. It was not open to the decision-maker merely to give the harm such weight as he thought fit, in the exercise of his planning judgment. In *East Northamptonshire DC*, the inspector erred in not giving the harm to the listed building "considerable importance and weight" in the planning balance, and instead treating the less than substantial harm to the setting of the listed buildings as a less than substantial objection to the grant of planning permission (at para 29).

99 This analysis was derived from the case law on earlier legislation expressed in similar terms. In *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141 the House of Lords held that the intention of the equivalent provision in the Town and Country Planning Act 1971 was to "give a high priority" to the statutory objective (per Lord Bridge of Harwich at p 146F–G).

100 In *Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303, Glidewell LJ held that the desirability of preserving or enhancing the conservation area was, in formal terms, a material consideration but added at p 1319A: "Since … it is a consideration to which special attention is to be paid as a matter of statutory duty, it must be regarded as having considerable importance and weight."

101 The principle set out in the case law above is reflected in the Framework at paragraph 199 which states:

> "199. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance."

102 The distinction between the duty to have "special regard" in section 66(1) LBCA 1990, and a duty "to have regard" which is found in other planning legislation, was considered in *Howell* [2014] EWHC 3627 (Admin), per Cranston J, at paras 42, 45, 46.

> "42. This first ground of challenge is that the Inspector made an error of law in misinterpreting his duty with respect to the Broads. Under section 17A of the 1988 Act, in exercising or performing any functions in relation to, or so as to affect, land in the Broads, the

A Secretary of State (and hence the Inspector) 'shall have regard to the purposes of— (a) conserving and enhancing the natural beauty, wildlife and cultural heritage of the Broads; (b) promoting opportunities for the understanding and enjoyment of the special qualities of the Broads by the public; and (c) protecting the interests of navigation.'"

"45. [Counsel for the claimant] submitted that the Inspector had fallen into the same trap as had occurred in *East Northamptonshire* B *District Council v Secretary of State for Communities and Local Government* [2015] 1 WLR 45. That was a case involving a listed building. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides for the general duty as respects granting planning permission for development which affects a listed building or its setting: the planning authority must 'have special regard C to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses'. In that case it was common ground between the parties that 'preserving' meant doing no harm: para 16. That did not mean that no harm could be done: however, there was a presumption against the grant of planning permission and considerable importance and weight had to be given to the desirability of preserving the setting of heritage assets when D balancing the proposal against other material considerations: paras 27–28. The planning inspector in that case had not done that.

"46. In my judgment the *East Northamptonshire DC* case is not directly applicable in this case since the 1988 Act requires the planning authority not to have "special regard" to the matter as does section 66(1), but simply to have regard to it. In this respect the 1988 Act E follows other planning legislation, for example, the Town and Country Planning Act 1990, section 70(2); the National Parks and Access to the Countryside Act 1949, section 11A(2); and the National Environment and Rural Communities Act 2006, section 40(1). To have regard to a matter means simply that that matter must be specifically considered, not that it must be given greater weight than other matters, certainly F not that it is some sort of trump card. It does not impose a presumption in favour of a particular result or a duty to achieve that result. In the circumstances of the case other matters may outweigh it in the balance of decision-making. On careful consideration the matter may be given little, if any, weight."

G **103** The defendant in this case drew my attention to the fact that section 66(2) LBCA 1990 also imposes the lesser duty "to have regard", suggesting that Parliament attached significance to the distinction between "special regard" and "to have regard".

104 In my judgment, applying the principles in *Howell*, the correct interpretation of the duty "to have regard", in regulation 3 of the Decisions Regulations 2010 is that it requires the decision-maker to take into account H the "desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses". It does not include the higher duty found in section 66(1) LBCA 1990 to treat a finding of harm to a listed building as a consideration to which the decision-maker must give "considerable importance and weight" when assessing the planning balance.

105 The relevant policy in NPS EN-1 (5.8.13–5.8.14) does not equate to the Framework policy on heritage assets (para 199). Of course, the Secretary of State has power to vary the policy tests to be applied, and to specify the nature of the duty to have regard in more detail. He has done so in other contexts (see ER 8.5.9) and it appears that he intends to do so in future in EN-1. Paragraph 5.9.21 of the draft emerging EN-1 requires:

> "5.9.21 When considering the impact of a proposed development on the significance of a designated heritage asset, the Secretary of State should give great weight to the asset's conservation. The more important the asset, the greater the weight should be. This is irrespective of whether any potential harm amounts to substantial harm, total loss, or less than substantial harm to its significance."

106 If and when this change to the policy takes effect, then decision-makers will be required to give "great weight" to an asset's conservation in the planning balance. The decision-maker will continue to make his own judgment as to the extent of the potential harm to the asset, but the weight to be given to that assessed harm in the planning balance will be prescribed by policy as "great weight".

107 I agree with the defendant and applicants that this point did not arise nor was it decided by Holgate J in the case of *Stonehenge* [2022] PTSR 74. Furthermore, Holgate J made no finding that the LBCA 1990 case law should be applied to the PA 2008.

Decision

108 On the issue of the correct approach to the weighing of heritage harm under the Decisions Regulations 2010 and NPS EN-1, the ExA reached the following conclusions:

> "8.5.9. In particular, the phrase 'great weight' which appears within the NPPF does not appear in NPS EN-1. This is at odds with later NPSs for different sectors, such as for instance, the Airports NPS (2018) or the Geological Disposal Infrastructure NPS (2019). Such wording complies with the findings of the Barnwell Manor judgment in 2014 (referred to by SASES [REP1–366]) which states that any harm to a heritage asset must be given 'considerable importance and weight'.
>
> "8.5.10. The Applicant notes in its response to ExQ1.8.1 that the NPPF does not contain specific policies for NSIPs, and that these are determined in accordance with the Planning Act 2008. It notes that the policy of 'great weight' set out in the NPPF is not reflected in NPS EN-1 and that the test of having 'special regard' [to the desirability of preserving a listed building or its setting or any features of special architectural or historic interest which it possesses] as set out in section 66 of the Planning (Listed Buildings and Conservation areas) Act 1990 is reduced to having 'regard' through regulation 3 of the Infrastructure Planning (Decisions) Regulations 2010.
>
> "8.5.11. The ExA agree with the Applicant's reasoning and interpretation of the law. However, it also considers that the 'direction of travel' of policy including the later wording of the NPPF and the policy

A of 'great weight' to be important and relevant, noting the Barnwell decision and the text of later NPSs in this regard."

109 The ExA summarised its conclusions on heritage at ER 8.6.2:

"• The ExA has had regard to the desirability of preserving the settings of the identified Listed Buildings and any features of special
B architectural or historic interest which they possess. Harmful impacts on the significance of various designated heritage assets have been identified, as well as to a non-designated heritage asset. NPS EN-1 requires such harm to be weighed against the public benefits of development—this assessment is carried out in Chapter 28, the Planning Balance.

C • Harm caused to the onshore historic environment has a medium negative weighting to be carried forward in the planning balance.

• Cumulative effects with the other East Anglia application increase this harm.

• Medium levels of harm are found as opposed to high due to the fact that harm to heritage assets has been found to be less than substantial. However, for several heritage assets the harm within this scale is at the
D higher end (including to a Grade II* listed building) and there would be substantial harm to a non-designated heritage asset. The ExA consider therefore that harm within the medium level of harm is at the top end of the scale."

110 The defendant agreed with the ExA's assessment and concluded:

E

"6.30 Overall, the ExA concluded that harm caused to the onshore historic environment had a medium negative weighting to be carried forward in the planning balance. The Secretary of State is aware that where there is an identified harm to a heritage asset he must give that harm considerable importance and weight and he does so in this case. Overall, the Secretary of State agrees with the ExA's conclusions
F on Onshore Historic Environment and in light of the public benefit of the Proposed Development is of the view that onshore historical environment matters do not provide a justification not to make the Order."

111 The defendant's counsel explained to me at the hearing that the
G defendant applied "considerable importance and weight" to the heritage harm in anticipation of the policy change to be introduced by the draft emerging EN-1. I would have expected to see an express reference to the requirement to apply "considerable importance and weight" to the heritage harm when the defendant undertook the planning balance in DL 27. DL 27.4 merely listed "onshore historic environment—medium negative weighting" along with the other assessed weightings. In the light of the clear statement
H in DL 6.30, I consider that this is more likely to be a drafting oversight than an error in the reasoning. But in any event, since the weight to be accorded to the heritage harm was not prescribed by statute, and the draft emerging EN-1 was not in force at the time, I do not consider that the defendant was required by law to apply "considerable importance and weight" to the heritage harm in the planning balance.

112 Therefore ground 2 does not succeed.

Ground 3: Noise

Claimant's submissions

113 The claimant submitted that the defendant erred in his treatment of noise impacts, in that he:

(i) failed to take into account that his conclusions on noise necessarily entailed a conflict with paragraph 5.11.9 of NPS EN-1;

(ii) relied on the imposition of a requirement which was in all the circumstances unreasonable in that it had not been shown to be workable; and/or

(iii) failed to take into account the impact of noise from switchgear/circuit breakers in the National Grid substation.

Sub-paragraph (i)

114 The claimant submitted that the ExA found that the applicants had not provided sufficient information to demonstrate that negative noise effects could be avoided in respect of tonality, constructive interference, operational and construction noise (ER 13.2.114–13.2.116). Accordingly, the defendant could not be satisfied that significant adverse effects could be avoided and so paragraph 5.11.9 of NPS EN-1 applied, and the defendant should not have granted development consent. Any departure from policy had to be explained and justified.

Sub-paragraph (ii)

115 Paragraph 4.1.7 of NPS EN-1 sets the test for requirements to be imposed on DCOs under section 120 PA 2008, in particular that requirements must be "reasonable". This aligns with the legal and policy tests for the imposition of planning conditions.

116 The PPG on "Use of planning conditions" and the now-cancelled Circular 11/95 "Use of conditions in planning permission" make clear that if it cannot be demonstrated that a condition will be met, it will not satisfy the requirements of reasonableness.

117 It is well established in the context of environmental impact assessment ("EIA") screening decisions that a conclusion that an impact is not significant based on proposed mitigation measures can only lawfully be reached if those measures are "established" and the likelihood of their success can be predicted with confidence. In cases of doubt, the precautionary principle applies (see the summary of the law in *R (Swire) v Secretary of State for Housing, Communities and Local Government* [2020] Env LR 29, per Lang J at paras 62–89).

118 Given the ExA accepted that there was no evidence the noise impacts could be avoided, there was no evidence to demonstrate that these noise limits could actually be met. Consequently, the requirement was unreasonable.

119 If the requirement cannot be met, the most likely outcome was an application in future for the requirement to be changed under Schedule 6 to PA 2008 or closure of the wind farm. These possibilities were not taken into account.

120 In the circumstances, a rational decision-maker would have refused consent.

Sub-paragraph (iii)

121 During the examination, the claimant expressed concern about the impacts of the impulsive noise created during the operational phase of switchgear (circuit breakers and isolators), particularly at night, on the National Grid substation. However the applicants, the ExA and the defendant failed to address this issue. This was an obviously material consideration which should have been taken into account.

Defendant and applicants' submissions

Sub-paragraph (i)

122 The defendant and applicants submitted that the ExA and the defendant plainly concluded that there was compliance with NPS EN-1 paragraph 5.11.9; that all noise impacts could be satisfactorily mitigated; and the noise requirements could be met.

Sub-paragraph (ii)

123 The imposition of a planning requirement is a matter of planning judgment for the decision-maker which can only be challenged if it discloses a public law error.

124 The ExA gave detailed consideration to the evidence, including expert evidence, on these issues. Both the ExA and the defendant were satisfied, on the evidence, that the requirements would be met, and that the noise impacts would be satisfactorily mitigated.

125 The defendant was not required to address the possibility that, at some future date, the wind farm might have to cease operation, or that the operator might apply to vary the requirements.

Sub-paragraph (iii)

126 The applicants addressed the issue of switchgear noise at the examination, and it was considered by the ExA. The defendant agreed with the ExA's conclusions. In any event, this issue was not an obviously material consideration.

Conclusions

Sub-paragraph (i)

127 Paragraphs 5.11.9 and 5.11.10 of NPS EN-1 provide:

> "5.11.9 The IPC should not grant development consent unless it is satisfied that the proposals will meet the following aims:
>
> • avoid significant adverse impacts on health and quality of life from noise;

• mitigate and minimise other adverse impacts on health and quality of life from noise; and

• where possible, contribute to improvements to health and quality of life through the effective management and control of noise.

"5.11.10 When preparing the development consent order, the IPC should consider including measurable requirements or specifying the mitigation measures to be put in place to ensure that noise levels do not exceed any limits specified in the development consent."

128 Thus, paragraph 5.11.9 requires that significant adverse impacts are avoided, but it contemplates that lesser adverse impacts may remain and, provided that they have been mitigated and minimised, there can be policy compliance.

129 Paragraph 5.11.9 reflects the noise policy aims set out in the Noise Policy Statement for England (March 2010). The Noise Policy Statement (at paragraphs 2.19 to 2.24) identifies three levels of noise impacts: "NOEL —No Observed Effect Level"; "LOAEL—Lowest Observed Adverse Effect Level" and "SOAEL—Significant Observed Adverse Effect Level". The policy advises that an impact at the level of SOAEL should be avoided. Where the impact lies somewhere between LOAEL and SOAEL, the policy "requires that all reasonable steps should be taken to mitigate and minimise adverse effects on health and quality of life …This does not mean that such adverse effects cannot occur".

130 The ExA set out the relevant policies on noise in NPS EN-1, at the beginning of Chapter 13, and it expressly had regard to them.

131 The ExA gave lengthy and thorough consideration to the noise issues at the Examination and in the ER.

(i) In respect of operational noise, it concluded:

"the Applicant's commitment to adopt Best Practicable Means (BPM) and the reduced operational noise limits now specified in Requirement 27 in the dDCO are consistent with national policy" (ER 13.2.116)

"… notwithstanding the differences of opinion, the ExA is satisfied that the Requirements in the dDCO must nevertheless be met, and consequently the ExA concludes that operational noise impacts can be satisfactorily mitigated." (ER 13.2.118.)

(ii) In respect of construction noise it concluded: "there are no significant outstanding issues in respect of construction noise which are not capable of satisfactory mitigation through Requirement 22 in the final version of the dDCO." (ER 13.2.117.)

132 I agree with the submission made by the defendant and the applicants that the ExA concluded that all noise impacts could be satisfactorily mitigated. Read in the context of NPS EN-1 paragraph 5.11.9 which the ExA had set out, and reinforced by the ExA's reference to consistency with national policy at ER 13.2.116, the ExA was plainly concluding that there was compliance with paragraph 5.11.9. The ExA's conclusion that all mitigation was "satisfactory" necessarily meant that the ExA concluded that it was effective to "avoid significant adverse impacts on health and quality of life" and to "mitigate and minimise other adverse impacts on health and quality of life" within the meaning of paragraph 5.11.9.

133 The defendant, at DL 11.10 – 11.11 recorded and agreed with the ExA's conclusions, which he was entitled to do, on the evidence and findings before him. There was no error of law in the approach taken to noise impacts.

Sub-paragraph (ii)

134 By section 120 PA 2008, the defendant has a power to include requirements in an order granting development consent.

135 NPS EN-1 paragraph 4.1.7 sets out policy on the exercise of the power:

> "The IPC should only impose requirements in relation to development consent that are necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects. The IPC should take into account the guidance in Circular 11/95, as revised, on 'The Use of Conditions in Planning Permissions' or any successor to it."

136 Circular 11/95 has been cancelled and replaced by the PPG on use of planning conditions. The PPG outlines circumstances where conditions should not be used, which include "Conditions which unreasonably impact on the deliverability of a development" (para 21a-005). A further circumstance where the PPG suggests that a condition may fail the test of reasonableness concerns conditions requiring action on land outside the control of the applicant. The PPG states (para 21a-009): "Such conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission."

137 These provisions on the imposition of requirements are separate from the EIA framework referred to by the claimant.

138 Whether to impose a requirement is a matter of planning judgment for the decision-maker which can only be challenged on the basis of irrationality or some other public law error.

139 The applications originally proposed an operational noise limit of 34dB LAeq at the nearest sensitive receptors, as recorded at ER 13.2.31. The limit was assessed as achievable in the ES, Chapter 25 Noise and Vibration, at paras 185–193. Subsequently, the applicants were able to commit to reduced operational noise limits of 31dB LAeq and 32dB LAeq, as recorded at ER 13.2.52. These limits have been incorporated into requirement 27. This was only 1dB or 2dB higher than the noise limit of 30dB LAeq which the claimant considered acceptable. The reduction was possible due to design refinements and identification of additional mitigation, and the new limits were again assessed as achievable (see "Clarification Note—Noise Modelling" at paras 49–53 and 90–93).

140 The claimant submitted that it identified at examination that there were risks of non-compliance arising from tonal characteristics of the noise, and from constructive interference. However, both those matters were the subject of specific evidence from the applicants explaining why these matters would not prevent compliance with the noise limits. This was part of a wider evidence base showing requirement 27 to be achievable.

141 The applicants submitted an expert report on noise dated 4 March 2021 by Colin Cobbing BSc (Hons) CEnvH FCIEH MIOA, an acoustics

consultant. The report addressed the achievability of requirement 27, including the two contentions now particularly relied upon by the claimant, stating (p 12):

> "SASES then go on to make the claim that the EA1 substation is not directly comparable with those proposed for EA1N or EA2 and infer that the noise monitoring report is of little or no relevance. Again, this position lacks balance. Of course, there are differences but there are also similarities between EA1 and the proposed substations. The findings of the noise monitoring report for EA1 provides a useful indication of the likelihood of the presence of tones associated with substations incorporating modern technology.
>
> "In my opinion, the Examining Authority can be confident that the Projects can be designed to avoid any highly perceptible or clearly perceptible tones and it is likely that any tones can be avoided altogether.
>
> "If any tones are perceptible at the receiver locations, it would attract a correction in accordance with the BS4142 method and this would be accounted for in the proposed noise limit. This will drive the designers to minimise tonal features or eliminate them altogether. As explained earlier, this is a perfectly normal and acceptable way of controlling noise from commercial and industrial noise. Standing waves and interference patterns are also raised as a potential issue. These points, no doubt, are intended to cast doubt on the confidence that the Examining Authority can have in relation to these types of features. I agree in as much that this effect cannot be dismissed as a possibility, but it is highly improbable in my view. This is a matter that can be adequately addressed during the detailed design of the substations."

142 The ExA recorded this evidence at ER 13.2.68–13.2.69. Accordingly, the ExA had regard to expert evidence explaining why there could be confidence that the design of the projects enabled the limits to be achieved, notwithstanding the points raised by the claimant. Even where an impact cannot be ruled out, consent can be granted, subject to a requirement that prevents operation of the development beyond an acceptable noise level.

143 The ExA reached conclusions on tonal correction and constructive interference at ER13.2.114 and 13.2.115. It referred to the applicants' reliance on mitigation. The ExA did not disagree with the applicants' position recorded in those bullet points that the effects are "capable of satisfactory mitigation at detailed design stage". In its "Conclusions on noise matters" (ER 13.2.118), the ExA expressly concluded that operational noise impacts "can be satisfactorily mitigated". The second bullet point at ER 13.2.116, when read with the subsequent bullet points in ER 13.2.116 reflects the position set out in ER 13.2.114 and 13.2.115 that, to the extent that it is necessary, mitigation can be adequately addressed at detailed design stage. This was also East Suffolk Council's position (ER 13.2.85, 13.2.87, 13.2.95). As stated in the final bullet point of ER 13.2.116, the combination of adopting Best Practicable Means and operational noise limits met the national policy objectives in paragraph 5.11.9 of EN-1.

144 In addition, as noted at ER 13.2.60, the applicants submitted the onshore substation operational noise assessment which had been undertaken by the applicants to measure the sound levels from the already operational East Anglia ONE substation. As Mr Cobbing observed in the passage quoted

A above, this provided useful further evidence of the likely operational noise effects from the substation components of the proposed developments.

145 I accept the applicants' submission that noise impacts from a proposed development will necessarily be predictions, particularly in cases such as the present where the DCO provides an outline framework for development, with detailed design left to a subsequent stage. However, the existence of an element of uncertainty cannot in itself be a reason B to refuse consent. The predictions were based on noise emission levels from actual and operating plant, as well as engagement with the supply chain, with reasonable steps taken to minimise uncertainty, and conservative assumptions adopted as explained by Mr Cobbing in his expert report at 4.4. The availability of the assessment from the operational East Anglia ONE substation, which the ExA could plainly treat as at least similar to the C proposed developments, provided additional specific support for finding that it was appropriate to impose requirement 27. This evidence was expressly referred to by the ExA when concluding that operational noise impacts could be satisfactorily mitigated (Conclusions on noise matters at ER 13.2.118).

146 The achievability of the limit in requirement 27 was also confirmed and explained repeatedly in other submissions from the applicants to the D examination: the applicants' position statement on noise, at paras 41–51; the applicants' comments on the claimant's deadline 8 submissions, at ID4 p 16; the applicants' comments on the claimant's deadline 9 submissions at ID15–16 pp 8–9; the applicants' comments on the claimant's deadline 11 submissions at ID2 pp 26–33; and the applicants' final position statement for each application, at paras 65–66.

147 Requirement 12 requires the local planning authority's agreement to E be obtained to the design of the substations, including any noise mitigation, prior to commencement of relevant work. In particular, the applicants are required by the substations design principles statement to submit an operational noise design report for approval in accordance with requirement 12(2) which must include information on avoiding tonal penalties. That mechanism further enabled the ExA to be satisfied that the limits would be F achieved.

148 On the basis of the ExA's conclusions, there was no need to address the scenario presented by the claimant on the basis that the requirements were not met at some point in the future. The consented development must operate in accordance with the requirements imposed, and it will be for the undertaker to ensure that it is able to do so. If there was an application to vary requirement 27 at a later date, a separate statutory process would apply, G and the application would be judged on its merits.

149 In the light of the evidence, and the findings of the ExA, the defendant was entitled to conclude that the requirements were achievable and reasonable, and his decision does not disclose any error of law.

Sub-paragraph (iii)

H **150** Switchgear noise relates only to operational noise at the National Grid substation, not the EA1N and EA2 substations. The ExA expressly dealt with switchgear noise at ER 13.2.24:

> "Operational impacts were assessed using BS4142. The dominant operational noise sources are substation transformers, shunt reactors

> and rotating plant such as transformer coolers. The National Grid infrastructure does not contain any of these, so operational noise would come from switchgear and control systems, with noise levels imperceptible at the nearest NSR [noise sensitive receptor]."

151 That reflected the position set out in the applicants' ES, para 30. The position was further confirmed in the clarification note submitted by the applicants on 13 January 2021. The note explained that the switchgear equipment is only activated under an emergency or for occasional testing. An example was given of an existing substation where there were 26 activations of switchgear over a period of 18 months. Noise levels were modelled and the following conclusion was reached:

> "37. As the predicted noise level generated by the switchgear is below both the prevailing background and the maximum noise levels currently experienced at the agreed noise sensitive locations above, and due to the low occurrence of this item of equipment being operated, this item of National Grid Infrastructure has not been included or assessed further in the updated noise model."

152 The applicants responded to the claimant's comments on this issue, including orally at issue-specific hearing 12, and in writing in its comments on the claimant's deadline 8 submissions.

153 In the light of this evidence, I do not consider that either the ExA or the defendant failed to take account of switchgear noise.

154 Therefore, for the reasons set out above, ground 3 does not succeed.

Ground 4: Generating capacity

Claimant's submissions

155 The claimant submitted that the defendant failed to take into account representations made by the claimant that a requirement should be imposed to ensure that the applicants did not downsize the output from the estimated total generating capacity of 800MW for EA1N, and 900MW for EA2, once consent was granted. The minimum capacity was specified in the DCOs as more than 100 MW, in order to qualify as a NSIP under section 15(3)(b) PA 2008. The "finely balanced" case for granting the DCOs was contingent on the benefit of high renewable energy generation capacity. Further the defendant failed to give reasons for rejecting the claimant's representations.

156 The claimant also submitted that the defendant took into account an irrelevant consideration when making his decision, namely, the total proposed generating capacity of the development when this was not secured by a requirement in the DCO.

Defendant and applicants' submissions

157 The defendant and the applicants submitted that the ExA considered the claimant's representations, but accepted the applicants' view that the requirement proposed by the claimant was neither necessary nor appropriate. Therefore the claimant was aware of the reasons why its proposal was not accepted. The defendant adopted the same approach as the ExA.

158 The defendant was not obliged by law to include such a requirement. Furthermore, the defendant was entitled to take into account the benefits of the proposed electricity generation without those benefits formally secured

A as a requirement. These were matters of planning judgment for the defendant to determine.

Conclusions

159 Schedule 1 to the DCO describes the development authorised by work number 1(a) as: "an offshore wind turbine generating station with a
B gross electrical output capacity of over 100MW comprising up to 67 wind turbine generators … situated within the area shown on the works plans."

160 Thus the DCO only authorises the construction and operation of an offshore generating station above the 100MW threshold for NSIPs of that type identified in section 15(3) PA 2008. The purpose of securing that minimum level of capacity is to ensure that the generating station to be constructed and operated is a NSIP as defined by PA 2008.

C **161** Aside from the requirements of section 15(3) PA 2008, there is no legal or policy requirement for the generating capacity to be formally secured. Furthermore, as a general principle, there is no legal requirement that all benefits which are given weight in a planning balance must be formally secured, in order to be treated as material considerations. In this case, the decision to give weight in the planning balance to the generating capacity
D was a matter of judgment for the defendant.

162 During the examination, the claimant submitted that the development described in the DCO should be amended so as only to allow the proposed generating station to be developed at the power proposed in the application, subject to a small margin, to prevent future down-sizing.

163 The ExA addressed this submission in its commentary on the draft
E DCO. It summarised the claimant's arguments, and sought the applicants' response. In particular, the ExA asked the applicants whether securing a higher minimum level "may form a relevant component of greater public benefits" and whether or not there was a threshold for minimum capacity "that might be necessary to be secured in these proposed developments to ensure that a positive balance of benefit could be retained" (pp 23–24).

164 During the course of the examination (both in response to the
F ExA's commentary and the claimant's submissions, and in subsequent written submissions to the defendant), the applicants argued that such an amendment was both unnecessary and inappropriate on the facts of this case. In support of that argument, evidence was given and submissions were made, to the following effect:

(i) The applicants' intention was "to build out both projects to their
G maximum capacity" and they "have engaged extensively with the turbine and grid supply chains on this basis" (applicants' comments on the claimant's deadline 11 submissions).

(ii) It was important to retain some element of flexibility as to the ultimate generating capacity to be built, having regard to the way in which offshore wind farms are financed through the contract for difference ("CfD") auction process, and an example was given of how the market mechanism can
H operate so as to require individual projects to make use of the flexibility within DCOs as to how much generating capacity to build out at any one time (applicants' comments on the ExA's commentary on the draft DCO dated 24 February 2021).

(iii) The market mechanism nevertheless operates so as to drive delivery towards the higher end of the transmission capacity created in order to

achieve the price reductions reported in the Energy White Paper (the applicants explained the economic factors that lie behind that effect) (applicants' comments on the ExA's commentary on the draft DCO dated 24 February 2021).

(iv) The factors that lay behind previous significant reductions in capacity were explained as being the "considerable uncertainty regarding both turbine and grid technologies" which had existed at that earlier stage, but this "is no longer the case" (applicants' comments on the claimant's deadline 11 submissions).

(v) The increased Government targets for the deployment of offshore generating capacity to 40GW by 2030 was a clear signal to the market that there would be an acceleration of opportunity and that the future CfD auction rounds were likely to increase in capacity (applicants' comments on the ExA's commentary on the draft DCO dated 24 February 2021).

(vi) A significant reduction in capacity below that planned would make the proposed development unviable, essentially because the income generated by the station would not be sufficient to justify the costs incurred in developing and operating the assets (post-examination submissions to the defendant dated 31 January 2022).

165 Having regard to those matters, the applicants' position was that it was likely that the capacity ultimately developed would be at the upper end of what was proposed, without any further provision being added to the DCO to mandate that result, and the planning balance should therefore be struck by reference to the likely scale of electrical output in light of the evidence that had been adduced (applicants' comments on the claimant's deadline 8 submissions).

166 The ExA conclusions on this issue were as follows:

> "5.2.10 In this context, the Proposed Development provides a substantial volume of renewable electricity generating capacity meeting a materially significant volume of projected national need and targets. In scalar terms, ES Chapter 2 [APP-050] indicatively calculates that, if developed, East Anglia ONE North would deliver some 2.5TWh/year of effectively zero carbon renewable electricity. The Applicant's calculations (section 2.2.2 of [APP-050] indicate that the Proposed Development has the potential to meet approximately 3.5% of the UK cumulative deployment target for 2030, although the ExA does not adopt a precise percentage figure for a number of reasons …"
>
> "5.2.13 It is also important to note that whilst the ES describes the effects on the receiving environment offshore of proposed generating station, it does not commit to a maximum renewable electricity yield for the Proposed Development. The Application Form [APP-002] identifies that the Proposed Development is expected to have a generating capacity of over 100MW (essential if the development is to be considered an NSIP under PA2008) but reserves adaptability around precise selection of turbine blades and generators, with a view to maximising the installed generating capacity and yield within the expected market framework of a Contract for Difference (CfD) auction."

167 The ExA therefore recognised that the actual volume to be delivered was not fixed but was flexible. The ExA explained why they did not "adopt a precise percentage figure". The weighing of this benefit therefore rested on

A the potential generating capacity, rather than any specific and fixed minimum scale of generation being delivered above the 100MW threshold.

168 The defendant agreed with the ExA's conclusions as to the benefits of the proposed development in this respect, and the weight to be attached to the contribution to meeting the need identified in the NPS EN-1 (DL 27.1 and 27.3). In endorsing those conclusions the defendant did not assume that any specific minimum capacity above 100MW was certain to be delivered. B Instead, he (like the ExA) carried out the planning balance on the broader basis that what was consented would constitute "highly significant additional renewable energy generation capacity in scalar terms" (DL 27.1). That was a conclusion reasonably open to him on the evidence. It was plainly a material planning consideration and the weight that was attached to it was entirely a matter for the defendant's planning judgment. Nothing further was required C to enable the defendant to lawfully conclude that the associated public benefits were "sufficient to outweigh the negative impacts that have been identified" (DL 27.1).

169 In my judgment, the reasons given by the defendant were adequate and intelligible and met the required standard. The ERs and DL were addressed to parties who were well aware of the arguments and evidence D involved.

170 Therefore, for the reasons set out above, ground 4 does not succeed.

Ground 5: Cumulative effects

Claimant's submissions

E **171** The claimant submitted that the defendant irrationally excluded from consideration the cumulative effects of known plans for extension of the site, by the addition of other projects to connect at the same location in Friston, and failed to take into account environmental information relating to those projects, in breach of the EIA Regulations 2017.

172 The proposed National Grid substation at Friston may form the connection location for other projects, in particular, for two interconnectors, F Nautilus and Eurolink, promoted by National Grid Ventures, and a further interconnector, Sealink, promoted by National Grid Electricity Transmission ("NGET"). There is also the potential for other wind farms to connect to the grid at the same location.

173 The claimant expressed concerns about the cumulative effects of the other projects during the examination. At the request of the ExA, G the applicants produced the "Extension of National Grid Substation Appraisal" ("the Extension Appraisal") which gave information about the likely environmental effects of extending the proposed National Grid substation at Friston to accommodate the Nautilus and Eurolink projects.

174 Neither the ExA nor the defendant considered the Extension Appraisal in reaching their conclusions. This was an error of law, for three reasons:

H (i) The defendant was required to consider the likely significant cumulative effects of the proposed development together with other projects. The Extension Appraisal contained information in respect of those effects which had been expressly required to be provided. Failing to take that information into account was a breach of the EIA Regulations, and irrational: see *Pearce* [2022] Env LR 4.

(ii) The ExA's reasoning for not considering that information was irrational. The ExA said that the information was "environmental information" and for that reason did not need to be taken into account. However, environmental information must be taken into account in deciding whether to grant development consent.

(iii) The reasons given were inadequate. It appears that the information was disregarded simply because the applicants did not wish to describe the document as a "cumulative impact assessment". However, the information could only be disregarded if it was not relevant, and accordingly these reasons were plainly inadequate.

175 The ExA cautioned that the scale of the impacts at Friston would mean that "utmost care" would be required if further development were to be proposed. As the decision was finely balanced, if the further likely significant effects of future development had been taken into account, the balance may have tipped against granting development consent.

176 The ExA and the defendant also failed to consider the effects of extension on a range of matters including flooding and transport, which were omitted from the Extension Appraisal. The ExA noted that it considered that "satisfactory assumptions" could "have been made by the applicant about the likely levels of traffic which would be generated by the proposed NGV interconnector projects to enable them to be included in the applicant's cumulative impact assessment" at ER 12.14. Yet at DL 12.17—12.19, the defendant found that there was a lack of information about the Nautilus and Eurolink projects which justified failing to assess them. Thus there was a further failure to take into account the cumulative effects of the interconnector projects.

Defendant and applicants' submissions

177 There was no breach of the defendant's obligations under the EIA Regulations 2017. There was insufficient reliable information on the projects to carry out a cumulative impact assessment. The information specified in Advice Note 17 was not available.

178 The projects were some considerable way from being "existing or approved projects" in respect of which a cumulative assessment would be required by reference to paragraph 5 of Schedule 4 to the EIA Regulations 2017.

179 The Extension Appraisal was considered and taken into account by the ExA and the defendant as "environmental information" submitted by the applicants during the examination, but it did not have the status of "further information" which was "directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment" and which it is necessary to include in an environmental statement.

180 The defendant's conclusions were a legitimate exercise of his planning judgment and clearly rational.

181 The reasons in the DL were sufficient and intelligible.

Conclusions

The EIA Regulations 2017 and case law

182 Regulation 21 of the EIA Regulations 2017 provides:

A "21 *Consideration of whether development consent should be granted*

(1) When deciding whether to make an order granting development consent for EIA development the Secretary of State must— (a) examine the environmental information; (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary; (c) integrate that conclusion into the decision as to whether an order is to be granted; and (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures."

183 Regulation 3—"Interpretation" defines the following relevant terms:

C "'environmental information' means the environmental statement (or in the case of a subsequent application, the updated environmental statement), including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations and any representations duly made by any other person about the environmental effects of the development and of any associated development;

D "'environmental statement' has the meaning given by regulation 14; …"

"'further information' means additional information which, in the view of the Examining authority, the Secretary of State or the relevant authority, is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment and which it is necessary to include in an environmental statement or updated environmental statement in order for it to satisfy the requirements of regulation 14(2); …"

E "'any other information' means any other substantive information provided by the applicant in relation to the environmental statement or updated environmental statement; …"

F **184** Regulation 14 provides:

"14 *Environmental statements*

"(1) An application for an order granting development consent for EIA development must be accompanied by an environmental statement.

"(2) An environmental statement is a statement which includes at least— (a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development; (b) a description of the likely significant effects of the proposed development on the environment; (c) a description of any features of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment; (d) a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment; (e) a non-technical summary of the information referred to in sub-paragraphs (a) to (d); and (f) any additional information specified in Schedule 4 relevant to the specific

characteristics of the particular development or type of development and to the environmental features likely to be significantly affected.

"(3) The environmental statement referred to in paragraph (1) must — (a) where a scoping opinion has been adopted, be based on the most recent scoping opinion adopted (so far as the proposed development remains materially the same as the proposed development which was subject to that opinion); (b) include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment; and (c) be prepared, taking into account the results of any relevant UK environmental assessment, which is reasonably available to the applicant with a view to avoiding duplication of assessment."

185 Schedule 4 sets out information for inclusion in environmental statements. Paragraph 5 requires a

"description of the likely significant effects of the development on the environment resulting from, inter alia … (e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources".

It continues that the description of likely significant effects should cover "cumulative" effects of the development.

186 In *Pearce* [2022] Env LR 4, Holgate J quashed a DCO where the Secretary of State deferred his evaluation of the cumulative impacts of a substation development on the basis that the information on the development was "limited", without giving a properly reasoned conclusion as to whether an evaluation could be made.

187 Holgate J summarised the relevant case law at paras 95–117, which I have cited in part below:

"108. Although it is a matter of judgment for the decision-maker as to what are the environmental effects of a proposed project and whether they are significant, EIA legislation proceeds on the basis that he is required to evaluate and weigh those effects he considers to be significant (and any related mitigation) in the decision on whether to grant development consent (see eg *European Commission v Ireland* (Case C-50/09) [2011] PTSR 1122) …

"109. The next issue is whether consideration of an environmental effect can be deferred to a subsequent consenting process. If, for example, the decision-maker has judged that a particular environmental effect is not significant, but further information and a subsequent approval is required, a decision to defer consideration and control of that matter, for example, under a condition imposed on a planning permission, would not breach EIA legislation (see *R v Rochdale Metropolitan Borough Council, Ex p Milne* [2000] Env LR 1).

"110. But the real question in the present case is whether the evaluation of an environmental effect can be deferred if the decision-maker treats the effect as being significant, or does not disagree with the 'environmental information' before him that it is significant? A range,

A or spectrum, of situations may arise, which I will not attempt to describe exhaustively."

"114. In order to comply with the principle identified in *Commission v Ireland*, and illustrated by [*Ex p Milne*] and [*R v Cornwall County Council, Ex p Hardy* [2001] Env LR 25], consideration of the details of a project defined in an outline consent may be deferred to a subsequent process of approval, provided that: (1) the likely B significant effects of that project are evaluated at the outset by adequate environmental information encompassing: (a) the parameters within which the proposed development would be constructed and operated (a 'Rochdale envelope'); and (b) the flexibility to be allowed by that consent; and (2) the ambit of the consent granted is defined by those parameters (see *Ex p Milne* at paras 90 and 93–95). Although in *Ex* C *p Milne* the local planning authority had deferred a decision on some matters of detail, it had not deferred a decision on any matter which was likely to have a significant effect (see Sullivan J at para 126), a test upon which the Court of Appeal lay emphasis when refusing permission to appeal (C/2000/2851 on 21 December 2000 at para 38). Those matters which were likely to have such an effect had been adequately evaluated at the outline stage.

D "115. Sullivan J also held in *Ex p Milne* that EIA legislation plainly envisages that the decision-maker on an application for development consent will consider the adequacy of the environmental information, including the ES. He held that what became regulation 3(2) of the [Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (SI 2009/2263)] imposes an obligation on the E decision-maker to have regard to a 'particularly material consideration', namely the 'environmental information'. Accordingly, if the decision-maker considers that the information about significant environmental effects is too uncertain or is inadequate, he can either require more detail or refuse consent (paras 94–95 and 106–111). I would simply add that the issue of whether such information is truly inadequate in a particular F case may be affected by the definition of 'environmental statement', which has regard to the information which the applicant can 'reasonably be required to compile' (regulation 2(1) of the 2009 Regulations—see para 19 above).

"116. The principle underlying … *Ex p Milne* and *Hardy* can also be seen in *R (Larkfleet Ltd) v South Kesteven District Council* [2016] Env LR 4 when dealing with significant cumulative impacts. There, G the Court of Appeal held that the local planning authority had been entitled to grant planning permission for a link road on the basis that it did not form part of a single project comprising an urban extension development. The court held:

"(i) What is in substance and reality a single project cannot be 'salami-sliced' into smaller projects which fall below the relevant H threshold so as to avoid EIA scrutiny (para 35).

"(ii) But the mere fact that two sets of proposed works may have a cumulative effect on the environment does not make them a single project for the purposes of EIA. They may instead constitute two projects the cumulative effects of which must be assessed (para 36).

"(iii) Because the scrutiny of the cumulative effects of two projects may involve less information than if they had been treated as one (eg where one project is brought forward before another), a planning authority should be astute to see that the developer has not sliced up a single project in order to make it easier to obtain planning permission for the first project and to get a foot in the door for the second (para 37).

"(iv) Where two or more linked sets of works are properly regarded as separate projects, the objective of environmental protection is sufficiently secured by consideration of their cumulative effects in the EIA scrutiny of the first project, so far as that is reasonably possible, combined with subsequent EIA scrutiny of those impacts for the second and any subsequent projects (para 38).

"(v) The ES for the first project should contain appropriate data on likely significant cumulative impacts arising from the first and second projects to the level which an applicant could reasonably be required to provide, having regard to current knowledge and methods of assessment (paras 29–30, 34 and 56).

"117. However, in some cases these principles may allow a decision-maker properly to defer the assessment of cumulative impacts arising from the subsequent development of a separate site not forming part of the same project. In *R (Littlewood) v Bassetlaw District Council* [2009] Env LR 21 the court held that it had not been irrational for the local authority to grant consent for a freestanding project, without assessing cumulative impacts arising from future development of the remaining part of the site, where that development was inchoate, no proposals had been formulated and there was not any, or any adequate, information available on which a cumulative assessment could have been based (pp 413–415 in particular para 32).

"118. I agree with [counsel for the claimant] that the circumstances of the present case are clearly distinguishable from *Littlewood*. Here, the two projects are closely linked, site selection was based on a strategy of co-location and the second project has followed on from the first after a relatively short interval. They share a considerable amount of infrastructure, they have a common location for connection to the National Grid at Necton (the cumulative impacts of which are required to be evaluated) and the DCO for the first project authorises enabling works for the second. In the present case, proposals for the second project have been formulated and the promoter of the first project has put forward what it considered to be sufficient information on the second to enable cumulative impacts to be evaluated in the DCO decision on the first. This information was before the defendant. I reject the attempt by NVL to draw any analogy with the circumstances in *Littlewood* (at para 32) or with those in [*Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env LR 18] (at para 75). In any event, the decision-maker in the present case, unsurprisingly, did not rely upon any reasoning of that kind in his decision letter (nor did the examining authority in the ExAR).

"119. Instead, this case bears many similarities with the circumstances in *Larkfleet*. If anything, the ability to assess cumulative impacts from the two projects in the decision on the first project was much more straightforward here and the legal requirement to make

A an evaluation of those impacts decidedly stronger. First, the promoter carried out an assessment identifying significant cumulative effects at Necton and it is common ground that, for this purpose, essentially the same information was provided on the two projects (see eg paras 52–53 above). Secondly, there were strong links between the two projects which were directly relevant to this subject (see para 118 above).

B "120. The effect of [Parliament and Council Directive 2011/92/EU], the 2009 Regulations and the case law is that, as a matter of general principle, a decision-maker may not grant a development consent without, firstly, being satisfied that he has sufficient information to enable him to evaluate and weigh the likely significant environmental effects of the proposal (having regard to any constraints on what an applicant could reasonably be required to provide) and secondly, C making that evaluation. These decisions are matters of judgment for the decision-maker, subject to review on *Wednesbury* grounds. Properly understood, the decision in *Littlewood* was no more than an application of this principle."

188 Holgate J's conclusion on the facts of the case before him were summarised at para 122:

D "In the circumstances of this case, I am in no doubt that the defendant did act in breach of the 2009 Regulations by failing to evaluate the information before him on the cumulative impacts of the Vanguard and Boreas substation development, which had been assessed by NVL as likely to be significant adverse environmental effects. The defendant E unlawfully deferred his evaluation of those effects simply because he considered the information on the development for connecting Boreas to the National Grid was "limited". The defendant did not go so far as to conclude that an evaluation of cumulative impacts could not be made on the information available, or that it was "inadequate" for that purpose. He did not give any properly reasoned conclusion on that aspect. I would add that because he did not address those matters, the F defendant also failed to consider requiring NVL to provide any details he considered to be lacking, or whether NVL could not reasonably be required to provide them under the 2009 Regulations as part of the ES for Vanguard. It follows the defendant could not have lawfully decided not to evaluate the cumulative impacts at Necton in the decision he took on the application for the Vanguard DCO. For these reasons, as well G as those given previously, the present circumstances are wholly unlike those in *Littlewood*."

189 Holgate J went on to find, in the alternative, that it was not rational to conclude that the information as to cumulative effects was too limited to be taken into account; and further that there had been a failure to give any adequate reasons for not considering the cumulative effects.

H

Decision

190 In my view, the facts and circumstances of this case were clearly distinguishable from those in *Pearce* [2022] Env LR 4 for the reasons given by the defendant at DL 12.16–DL 12.19.

191 The potential effects of a substation extension for the Nautilus and Eurolink projects were appraised by the applicants, to a limited extent only, in the Extension Appraisal. The applicants stated that it was not possible to undertake a cumulative impact assessment due to the lack of detailed publicly available information on them. It stated:

> "6. The Overarching National Policy Statement for Energy (EN-1) paragraph 4.2.5 states that 'When considering cumulative effects, the ES should provide information on how the effects of the applicant's proposal would combine and interact with the effects of other development (including projects for which consent has been sought or granted, as well as those already in existence)'.
>
> "7. *Advice note seventeen: Cumulative effects assessment relevant to nationally significant infrastructure projects* (AN17) sets out a cumulative assessment process with the stages of longlisting and shortlisting projects, information gathering and assessment.
>
> "8. Information gathering "requires the applicant to gather information on each of the 'other existing development and/or approved development' shortlisted at Stage 2. As part of the Stage 3 process the applicant is expected to compile detailed information, to inform the Stage 4 assessment. The information captured should include but not be limited to:
>
> • Proposed design and location information;
>
> • Proposed programme of construction, operation and decommissioning; and
>
> • Environmental assessments that set out baseline data and effects arising from the 'other existing development and/or approved development'.
>
> "9. The applicants maintain that for the remaining projects being considered for potential connection in the vicinity of Leiston (Nautilus and Eurolink) little to none of the information specified in Advice Note seventeen is available."

192 The ExA addressed the Extension Appraisal document and considered what potential impacts that extension might have, in addition to those proposed by the EA1N and EA2 DCOs. This included adverse impacts on landscape and visual matters (ER 7.5.58–60, 7.6.1) and heritage (ER 8.5.69–8.5.73).

193 On both issues, the ExA decided that these potential impacts were not to be factored in to "the reasoned conclusion on the significant effects of the development on the environment", for the purposes of regulation 21(1)(b) of the EIA Regulations 2017: see ER 7.6.2 and ER 8.6.2. The reason given was that the applicants had stated that the Extension Appraisal was not a "cumulative impact assessment". Therefore it only had the status of "environmental information", as defined in regulation 3 of the EIA Regulations 2017.

194 The defendant addressed this issue in the context of "Landscapes and Visual Amenity" as follows:

> "5.12 In response to significant concerns from a number of parties (including the Councils') about future projects, the Applicant submitted an Extension of National Grid Substation Appraisal [ExA Ref: REP8–

074]. This Appraisal assessed the potential effects of extending the National Grid substation to accommodate future projects, including: Nautilus interconnector, EuroLink interconnector, North Falls and Five Estuaries offshore wind farms. However, the Appraisal states "it has been confirmed by both the proposed North Falls [ExA Ref: REP7–066] and Five Estuaries projects that they will not connect near Leiston.

"5.13 The Secretary of State notes that the future projects considered are in the following stages of development:

• Nautilus interconnector—National Grid Ventures requested a section 35 direction under the Planning Act 2008 on 4 March 2019, the Secretary of State received further information from National Grid Ventures on 4 April 2019 and a direction was made by the Secretary of State on 29 April 2019. The application is expected to be submitted to the Planning Inspectorate Q2 2023.

• EuroLink interconnector—is a proposal by National Grid Ventures to build a HVDC transmission cable between the UK and the Netherlands. The capacity of the link will be 1.4 GW and the project is still in the very early stages of development. No information on this project has currently been submitted to the Planning Inspectorate or the Secretary of State.

"5.14 Currently, the only documentation available on the Planning Inspectorate's website for the Nautilus interconnector project is the Section 35 Direction made by the Secretary of State for the proposed development to be treated as development for which development consent is required under the 2008 Act. The Eurolink interconnector project is earlier in the development consent process than Nautilus, and no documentation has been submitted to the Planning Inspectorate. Consequently, there is very limited environmental information available which would allow the Applicant to conduct a cumulative assessment. The Applicant's decision not to include these proposed projects in its cumulative effects assessment is also supported by the Planning Inspectorate's Advice Note Seventeen: Cumulative effects assessment relevant to nationally significant infrastructure projects. Paragraph 3.3.1 of the Advice Note lists the information required to conduct stage 4 of a cumulative effects assessment:

• proposed design and location information;

• proposed programme of construction, operation and decommissioning; and

• environmental assessments that set out baseline data and effects arising from the 'other existing development and/or approved development'.

"5.15 As none of the above information was available prior to the close of the East Anglia ONE North and East Anglia TWO examination period for either the Nautilus or Eurolink projects, the Secretary of State is content that it was not necessary for the Applicant to include these proposed projects in its cumulative effects assessment. Further details of the Secretary of State's position on the inclusion of these projects in the Applicant's cumulative assessment can be found in paragraph 12.14 of this document.

"5.16 The ExA [ER 7.6.1] concludes that: 'The extension of National Grid Substation Appraisal [ExA Ref: REP8–074] demonstrates

a significant worsening of potential adverse effects for relevant VPs [Viewpoints] and for landscape character. The extension of the NG substation would intensify and worsen the effects of the Proposed Development on both the local landscape and on visual receptors. Such an effect would be added to in an unknown way by the provision of required surface water drainage."

"5.22 In reaching the above conclusions the ExA has not considered the Extension of National Grid Substation Appraisal, noting that the Applicant acknowledges that the Appraisal is 'environmental information' and is not intended to comprise a Cumulative Impact Assessment.

"5.23 The Secretary of State agrees with the ExA's conclusions on Landscape and Visual Amenity."

195 In his conclusions on the "Onshore Historic Environment", the defendant stated:

"*Cumulative Impacts with the Potential National Grid Extension*

"6.26 The Applicant submitted a National Grid Substation Appraisal during the examination which indicated the potential effects which would result from extending the National Grid substation to accommodate future projects. The Appraisal indicated that this would result in an increase in the overall length of the National Grid Substation [ER 8.5.69]. The ExA considered that an extension to the National Grid substation would increase the magnitude of harm to Little Moor Farm (Grade II), the Church of St Mary (Grade II*), Friston House (Grade II), Woodside Farm House (Grade II) and High House Farm (Grade II). However, the increase in magnitude would not result in an increase to the overall levels of less than substantial harm it had assigned, as such, the levels would remain the same as detailed in paragraph 6.17. The ExA considered that the overall level of less than substantial harm for the Friston War Memorial would potentially increase to a medium level of less than substantial harm [ER 8.5.72; 8.6.1].

"6.27 The ExA stated [ER 8.6.1] that it had not considered the National Grid Substation Appraisal in reaching its overall conclusion on Onshore Historic Environment—noting that the Applicant acknowledged that the Appraisal is 'environmental information' and is not intended to comprise a Cumulative Impact Assessment."

196 In his conclusions on "Transport and Traffic", the defendant stated:

"12.14 With regards to the inclusion of the Nautilus and Eurolink interconnector projects in the cumulative effects assessment, the Secretary of State notes that Friston is a potential connection point for the National Grid Ventures interconnector projects [ER 14.5.15]. However, the Secretary of State disagrees with the ExA's statement [ER 14.5.17] that satisfactory assumptions could have been made to allow the Nautilus and Eurolink interconnector projects to be included in the Applicant's cumulative impact assessment.

"12.15 Predicting the future traffic effects of projects for which very few details are available would not be helpful in determining the cumulative effects of the East Anglia ONE North and East Anglia TWO developments, as the elements of the future projects which would

A contribute to adverse traffic effects are likely to change significantly before their applications are submitted to the Planning Inspectorate. Attempting to predict the traffic movements at this early stage in the projects' lifecycle would rely on ambiguous assumptions and would not result in predictions which accurately represent the cumulative effects of the projects in question, or in mitigation which would adequately reduce the effects. In contrast, when the applications for the Nautilus and B Eurolink interconnector projects are further progressed, accurate up-to-date construction programme and traffic and transport information will be available for the East Anglia ONE North, East Anglia TWO and Sizewell C projects which would allow effective mitigation measures to be implemented by the respective developers.

"12.16 The Secretary of State refers to paragraph 44 of the recent C ruling from Mr Justice Holgate on the Norfolk Vanguard offshore wind farm in relation to cumulative effects which states: 'By the time the ES for the Vanguard project was submitted in June 2018, substantial progress had already been made on Boreas. Grid connection agreements at Necton had been entered into for Vanguard in July 2016 and Boreas in November 2016. The site selection process had already identified preferred substation footprints for both Vanguard D and Boreas. The decision had been taken to use HVDC technology for both developments, determining the nature and scale of onshore infrastructure, including substations at Necton. The Boreas team had a pre-application meeting with the Planning Inspectorate on 24 January 2017, a request for a scoping opinion in respect of Boreas was made in May 2017 and the opinion issued in June 2017.'

E "12.17 Unlike the Norfolk Boreas Offshore Wind Farm project, no scoping opinion request has been submitted to the Planning Inspectorate for the Nautilus interconnector project, and it is currently in the early stages of the pre-application phase of the development consent process. So far, the only documentation available on the Planning Inspectorate's website for the Nautilus project is the Section 35 Direction. The Eurolink F interconnector project is earlier in the development consent process than Nautilus, and no documentation has yet been submitted to the Planning Inspectorate.

"12.18 The Secretary of State also notes that the Applicant's decision not to include these proposed projects in its cumulative effects assessment is supported by the Planning Inspectorate's Advice Note Seventeen: Cumulative effects assessment relevant to nationally G significant infrastructure projects. Paragraph 3.3.1 of the Advice Note lists the information required to conduct stage 4 of a cumulative effects assessment:

- proposed design and location information;
- proposed programme of construction, operation and decommissioning; and

H - environmental assessments that set out baseline data and effects arising from the 'other existing development and/or approved development'.

"12.19 As none of the above information was available prior to the close of the East Anglia ONE North and East Anglia TWO examination period for either the Nautilus or Eurolink interconnector projects, the

Secretary of State is content that it was not necessary for the Applicant to include these projects in its cumulative effects assessment."

197 I accept the submissions made by the defendant and the applicants that the approach taken by the defendant did not constitute a breach of the EIA Regulations 2017. The developments in question were not "existing and/or approved projects" in respect of which a cumulative assessment would be required by reference to paragraph 5 of Schedule 4 to the EIA Regulations 2017.

198 The Extension Appraisal did not constitute a cumulative impact assessment for the reasons set out in that document at 1.1. The two projects were at such an early stage that there was not sufficient reliable information to undertake a satisfactory cumulative assessment. That approach was in accordance with the guidance in Advice Note Seventeen.

199 The ExA and the defendant were entitled to regard the Extension Appraisal as "environmental information" but not "further information", as defined in regulation 3 of the EIA Regulations 2017, as it was not "additional information which, in the view of the Examining authority, the Secretary of State or the relevant authority, is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment and which it is necessary to include in an environmental statement … in order for it to satisfy the requirements of regulation 14(2)".

200 Like all other representations made by the applicants about the environmental effects of the development (ie "environmental information" as defined in regulation 3), the Extension Appraisal was carefully examined by the ExA, and fully taken into account by the defendant when making his decision. The issues of flooding and transport were considered in the screening assessment with the Extension Appraisal, but were not taken forward for further assessment.

201 The defendant was entitled, as the decision-maker, to disagree with the ExA's statement that satisfactory assumptions could have been made to allow the future projects to be included in the cumulative impact assessment, for the reasons he gave at DL 12.14–12.19. Furthermore, although the claimant relied upon the ExA's description of the decision as "finely balanced", the defendant took a different view and concluded that the applicants had a strong case (DL 27.7).

202 In my judgment, the defendant's approach cannot be characterised as irrational. He was entitled to agree, in the exercise of his judgment, with the applicants' case that the uncertainties about the future projects were such that it was not possible to undertake a reliable assessment of cumulative effects for the purposes of regulation 21(1)(b) of the EIA Regulations 2017.

203 Finally, I consider that the reasons given for the decision were clear and sufficient, and met the legal standard.

Ground 6: Alternative sites

Claimant's submissions

204 In the light of the findings of substantial adverse effects at Friston, and the applicants' reliance upon the benefits of the proposed development, the ExA and the defendant erred in failing to consider alternative sites, and fell into the same error as the Secretary of State for Transport in *Stonehenge* [2022] PTSR 74.

205 The ExA and the defendant ignored the possibility of seeking a review of the National Grid's connection offers made in the CION process.

206 The ExA and the defendant erred in law in dismissing alternative sites proposed by others on the basis that they had not been considered and assessed by the applicants. In fact, the applicants had failed to address alternative sites, including Bramford, as originally intended.

Defendant and applicants' submissions

207 The defendant and applicants submitted that the claimant misstated the relevant legal principles on alternative sites, as applied in *Stonehenge* and the preceding case law. Furthermore, *Stonehenge* was clearly distinguishable on the facts of the case, and the findings of the court.

208 In this case, alternative sites were adequately considered by the ExA and the defendant, including Bramford. Some further alternative sites, which had not been appraised, were not progressed beyond inspection stage by the ExA, in the exercise of its planning judgment, as they were not considered to be "important and relevant" to the Secretary of State's decision under section 104(2)(d) PA 2008 and NPS EN-1. That was a lawful exercise of planning judgment.

Conclusions

Law and policy

209 The authorities were helpfully reviewed by Holgate J in *Stonehenge*, at paras 268–276:

> "268. The principles on whether alternative sites or options may permissibly be taken into account or whether, going further, they are an 'obviously material consideration' which must be taken into account, are well established and need only be summarised here.
>
> "269. The analysis by Simon Brown J (as he then was) in *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P & CR 293, 299–300 has subsequently been endorsed in several authorities. First, land may be developed in any way which is acceptable for planning purposes. The fact that other land exists upon which the development proposed would be yet more acceptable for such purposes would not justify the refusal of planning permission for that proposal. But, secondly, where there are clear planning objections to development upon a particular site then 'it may well be relevant and indeed necessary' to consider whether there is a more appropriate site elsewhere. 'This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it.' Examples of this second situation may include infrastructure projects of national importance. The judge added that, even in some cases which have these characteristics, it may not be necessary to consider alternatives if the environmental impact is relatively slight and the objections not especially strong.
>
> "270. The Court of Appeal approved a similar set of principles in *R (Mount Cook Land Ltd) v Westminster City Council* [2017] PTSR 1166, at para 30. Thus, in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses

on the application site or of the same use on alternative sites are normally irrelevant. In those 'exceptional circumstances' where alternatives might be relevant, vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant or, where relevant, should be given little or no weight.

"271. Essentially the same approach was set out by the Court of Appeal in *R (Jones) v North Warwickshire Borough Council* [2001] 2 PLR 59, paras 22–30. At para 30 Laws LJ stated: 'it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking —and I lay down no fixed rule, any more than did Oliver LJ or Simon Brown J—such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question.'

"272. In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P & CR 19 Carnwath LJ emphasised the need to draw a distinction between two categories of legal error: first, where it is said that the decision-maker erred by taking alternatives into account and second, where it is said that he had erred by failing to take them into account (paras 17 and 35). In the second category an error of law cannot arise unless there was a legal or policy requirement to take alternatives into account, or such alternatives were an 'obviously material' consideration in the case so that it was irrational not to take them into account (paras 16–28).

"273. In *R (Langley Park School for Girls) v Bromley London Borough Council* [2010] 1 P & CR 10 the Court of Appeal was concerned with alternative options within the same area of land as the application site, rather than alternative sites for the same development. In that case it was necessary for the decision-maker to consider whether the openness and visual amenity of metropolitan open land ('MOL') would be harmed by a proposal to erect new school buildings. MOL policy is very similar to that applied within a Green Belt. The local planning authority did not take into account the claimant's contention that the proposed buildings could be located in a less open part of the application site resulting in less harm to the MOL. Sullivan LJ referred to the second principle in *Trusthouse Forte* and said that it must apply with equal, if not greater, force where the alternative suggested relates to different siting within the same application site rather than a different site altogether (paras 45–46). He added that no 'exceptional circumstances' had to be shown in such a case (para 40).

"274. At paras 52–53 Sullivan LJ stated:

'52. It does not follow that in every case the "mere" possibility that an alternative scheme might do less harm must be given no weight. In the *Trusthouse Forte* case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. There is no "one

size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.

'53. Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. In the present case the members were not asked to make that judgment. They were effectively told at the onset that they could ignore Point (b), and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application.'

"275. The decision cited by Mr Taylor in *First Secretary of State v Sainsbury's Supermarkets Ltd* [2008] JPL 973 is entirely consistent with the principles set out above. In that case, the Secretary of State did in fact take the alternative scheme promoted by Sainsbury's into account. He did not treat it as irrelevant. He decided that it should be given little weight, which was a matter of judgment and not irrational (paras 30 and 32). Accordingly, that was not a case, like the present one, where the error of law under consideration fell within the second of the two categories identified by Carnwath LJ in *Derbyshire Dales District Council* (see para 272 above).

"276. The wider issue which the Court of Appeal went on to address at paras 33–38 of the *Sainsbury's* case does not arise in our case, namely, must *planning permission be refused* for a proposal which is judged to be 'acceptable' because there is an alternative scheme which is considered to be more acceptable. True enough, the decision on acceptability in that case was a balanced judgment which had regard to harm to heritage assets but that was, undoubtedly, an example of the first principle stated in *Trusthouse Forte* (see para 269 above). The court did not have to consider the second principle, which is concerned with whether a decision-maker may be obliged to take an alternative *into account*. Indeed, in the present case, there is no issue about whether alternatives for the western cutting should have been taken into account. As I have said, the issue here is narrower and case-specific. Was the SST entitled to go no further, in substance, than the approach set out in paragraph 4.27 of the [National Policy Statement for National Networks ('NPSNN')] and [Panel Report ('PR')] 5.4.71?"

210 Holgate J's conclusions in the *Stonehenge* case [2022] PTSR 74 were as follows: A

"277 In my judgment, the clear and firm answer to that question is 'no'. The relevant circumstances of the present case are wholly exceptional. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the [Secretary of State for Transport ('SST')] was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account. I reach this conclusion for a number of reasons, the cumulative effect of which I judge to be overwhelming. B

"278. First, the designation of the [World Heritage Site ('WHS')] is a declaration that the asset has 'outstanding universal value' for the cultural heritage of the world as well as the UK. There is a duty to protect and conserve the asset (article 4 of the Convention) and there is the objective inter alia to take effective and active measures for its 'protection, conservation, presentation and rehabilitation' (article 5). The NPSNN treats a World Heritage Site as an asset of 'the highest significance' (paragraph 5.131). C D

"279. Second, the SST accepted the specific findings of the Panel on the harm to the settings of designated heritage assets (eg scheduled ancient monuments) that would be caused by the western cutting in the proposed scheme. He also accepted the Panel's specific findings that [Outstanding Universal Value ('OUV')] attributes, integrity and authenticity of the WHS would be harmed by that proposal. The Panel concluded that that overall impact would be 'significantly adverse', the SST repeated that (DL 28) and did not disagree (see paras 137,139 and 144 above). E

"280. Third, the western cutting involves large scale civil engineering works, as described by the Panel. The harm described by the Panel would be permanent and irreversible.

"281. Fourth, the western cutting has attracted strong criticism from the WHC and interested parties at the Examination, as well as in findings by the Panel which the SST has accepted. These criticisms are reinforced by the protection given to the WHS by the objectives of articles 4 and 5 of the Convention, the more specific heritage policies contained in the NPSNN and by regulation 3 of the 2010 Regulations. F

"282. Fifth, this is not a case where no harm would be caused to heritage assets (see [*City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government* [2021] 1 WLR 5761] at para 78). The SST proceeded on the basis that the heritage benefits of the scheme, in particular the benefits to the OUV of the WHS, did not outweigh the harm that would be caused to heritage assets. The scheme would not produce an overall net benefit for the WHS. In that sense, it is not acceptable per se. The acceptability of the scheme depended upon the SST deciding that the heritage harm (and in the overall balancing exercise *all* disbenefits) were outweighed by the need for the new road and *all* its other benefits. This case fell fairly and squarely within the exceptional category of cases identified in, for example, *Trusthouse* G H

Forte, where an assessment of relevant alternatives to the western cutting was required (see para 269 above).

"283. The submission of [counsel for the Secretary of State] that the SST has decided that the proposed scheme is 'acceptable', so that the general principle applies that alternatives are irrelevant is untenable. The case law makes it clear that that principle does not apply where the scheme proposed would cause significant planning harm, as here, and the grant of consent *depends* upon its adverse impacts being outweighed by need and other benefits (as in paragraph 5.134 of the NPSNN).

"284. I reach that conclusion without having to rely upon the points on which the claimant has succeeded under ground 1(iv). But the additional effect of that legal error is that the planning balance was not struck lawfully and so, for that separate reason, the basis upon which [counsel for the Secretary of State] says that the SST found the scheme to be acceptable collapses.

"285. Sixth, it has been accepted in this case that alternatives should be considered in accordance with paragraphs 4.26 and 4.27 of the NPSNN. But the Panel and the SST misdirected themselves in concluding that the carrying out of the options appraisal for the purposes of the [Road Investment Strategy ("RIS")] made it unnecessary for them to consider the merits of alternatives for themselves. [Highways England ("IP1")]'s view that the tunnel alternatives would provide only 'minimal benefit' in heritage terms was predicated on its assessments that no substantial harm would be caused to any designated heritage asset and that the scheme would have slightly *beneficial* (not adverse) effects on the OUV attributes, integrity and authenticity of the WHS. The fact that the SST accepted that there would be net harm to the OUV attributes, integrity and authenticity of the WHS (see paras 139 and 144 above) made it irrational or logically impossible for him to treat IP1's options appraisal as making it unnecessary for him to consider the relative merits of the tunnel alternatives. The options testing by IP1 dealt with those heritage impacts on a basis which is inconsistent with that adopted by the SST.

"286. Seventh, there is no dispute that the tunnel alternatives are located within the application site for the DCO. They involve the use of essentially the same route and certainly not a completely different site or route. Accordingly, as Sullivan LJ pointed out in *Langley Park* (see para 273 above), the second principle in *Trusthouse Forte* applies with equal, if not greater force.

"287. Eighth, it is no answer for the SST to say that DL 11 records that the SST has had regard to the "environmental information" as defined in regulation 3(1) of the EIA Regulations 2017. Compliance with a requirement to take information into account does not address the specific obligation in the circumstances of this case to compare the relative merits of the alternative tunnel options.

"288. Ninth, it is no answer for the SST to say that in DL 85 the SST found that the proposed scheme was in accordance with the NPSNN and so section 104(7) of the PA 2008 may not be used as a "back door" for challenging the policy in paragraph 4.27 of the NPSNN. I have previously explained why paragraph 4.27 does not override paragraph 4.26 of the NPSNN and does not disapply the common law principles

on when alternatives are an obviously material consideration. But, in addition, the SST's finding that the proposal accords with the NPSNN for the purposes of section 104(3) of the PA 2008 is vitiated (a) by the legal error upheld under ground 1(iv) and, in any event, (b) by the legal impossibility of the SST deciding the application in accordance with paragraph 4.27 of the NPSNN.

"289. I should add, for completeness, that neither the Panel nor the SST suggested that the extended tunnel options need not be considered because they were too vague or inchoate. That suggestion has not been raised in submissions." (Original emphasis.)

211 In my judgment, Holgate J was here applying the principles in the case law which he had previously set out to the circumstances of this "wholly exceptional" and "overwhelming" case. He was not establishing as a principle of law that, in any case where a proposed development would cause adverse effects, but these are held to be outweighed by its beneficial effects, the existence of alternative sites inevitably becomes a mandatory material consideration. That is an over-simplification of the *Stonehenge* decision [2022] PTSR 74, and the preceding body of case law. In *R (Jones) v North Warwickshire Borough Council* [2001] 2 PLR 59, para 30, Laws J made it clear that neither he nor Simon Brown J in the *Trusthouse Forte* case were laying down a "fixed rule".

212 In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P & CR 19, Carnwath LJ held that an error of law could not arise unless there was a statutory or policy requirement to take alternatives into account, or such alternatives were an "obviously material" consideration in the case so that it was irrational not to take them into account (paras 16–28). This analytical approach has been widely applied.

213 In *Langley Park School for Girls v Bromley London Borough Council* [2010] 1 P & CR 10, Sullivan LJ at paras 52–53 considered the varying circumstances in which a decision-maker may be required to take alternative sites into account, and emphasised that the assessment was highly fact-sensitive and a matter within the planning judgment of the decision-maker.

214 Furthermore, in my judgment, the defendant and applicants were correct to submit that the case law does indicate that consideration of alternative sites will only be relevant to a planning application in exceptional circumstances (see *R (Mount Cook Land Ltd) v Westminster City Council* [2017] PTSR 1166, cited at para 270 in *Stonehenge*; *Jones*, cited at para 271 in *Stonehenge*; *Langley Park*, cited at para 273 in *Stonehenge*, and see also in the law report at [2010] 1 P & CR 10, at paras 37 and 40). This principle was applied by Holgate J in the *Stonehenge* case, at para 277, when he found that the circumstances were "wholly exceptional".

215 The PA 2008 does not include any express requirement to consider alternative sites, but such a requirement may arise from the terms of any national policy statement (section 104(2)(a) PA 2008) or if they are "other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision" (section 104(2)(d) PA 2008). This is a matter of judgment for the Secretary of State.

216 The policy guidance on alternatives in NPS EN-1 provides as follows:

A "*4.4 Alternatives*

"4.4.1 As in any planning case, the relevance or otherwise to the decision-making process of the existence (or alleged existence) of alternatives to the proposed development is in the first instance a matter of law, detailed guidance on which falls outside the scope of this NPS. From a policy perspective this NPS does not contain any general requirement to consider alternatives or to establish whether the proposed project represents the best option.

B

"4.4.2 However:

• applicants are obliged to include in their ES, as a matter of fact, information about the main alternatives they have studied. This should include an indication of the main reasons for the applicant's choice, taking into account the environmental, social and economic effects and including, where relevant, technical and commercial feasibility;

C

• in some circumstances there are specific legislative requirements, notably under the Habitats Directive, for the IPC to consider alternatives. These should also be identified in the ES by the applicant; and

• in some circumstances, the relevant energy NPSs may impose a policy requirement to consider alternatives (as this NPS does in Sections 5.3 [biodiversity], 5.7 [flood risk] and 5.9 [landscape and visual]).

D

"4.4.3 Where there is a policy or legal requirement to consider alternatives the applicant should describe the alternatives considered in compliance with these requirements. Given the level and urgency of need for new energy infrastructure, the IPC should, subject to any relevant legal requirements (eg under the Habitats Directive) which indicate otherwise, be guided by the following principles when deciding what weight should be given to alternatives:

E

• the consideration of alternatives in order to comply with policy requirements should be carried out in a proportionate manner;

• the IPC should be guided in considering alternative proposals by whether there is a realistic prospect of the alternative delivering the same infrastructure capacity (including energy security and climate change benefits) in the same timescale as the proposed development;

F

• where (as in the case of renewables) legislation imposes a specific quantitative target for particular technologies or (as in the case of nuclear) there is reason to suppose that the number of sites suitable for deployment of a technology on the scale and within the period of time envisaged by the relevant NPSs is constrained, the IPC should not reject an application for development on one site simply because fewer adverse impacts would result from developing similar infrastructure on another suitable site, and it should have regard as appropriate to the possibility that all suitable sites for energy infrastructure of the type proposed may be needed for future proposals;

G

• alternatives not among the main alternatives studied by the applicant (as reflected in the ES) should only be considered to the extent that the IPC thinks they are both important and relevant to its decision;

H

• as the IPC must decide an application in accordance with the relevant NPS (subject to the exceptions set out in the Planning Act 2008), if the IPC concludes that a decision to grant consent to a hypothetical alternative proposal would not be in accordance with the policies set

out in the relevant NPS, the existence of that alternative is unlikely to be important and relevant to the IPC's decision;

• alternative proposals which mean the necessary development could not proceed, for example because the alternative proposals are not commercially viable or alternative proposals for sites would not be physically suitable, can be excluded on the grounds that they are not important and relevant to the IPC's decision;

• alternative proposals which are vague or inchoate can be excluded on the grounds that they are not important and relevant to the IPC's decision; and

• it is intended that potential alternatives to a proposed development should, wherever possible, be identified before an application is made to the IPC in respect of it (so as to allow appropriate consultation and the development of a suitable evidence base in relation to any alternatives which are particularly relevant). Therefore where an alternative is first put forward by a third party after an application has been made, the IPC may place the onus on the person proposing the alternative to provide the evidence for its suitability as such and the IPC should not necessarily expect the applicant to have assessed it."

217 As NPS EN-1 indicates, there is a general requirement to address alternatives in the EIA process, in regulation 14(2)(d) of the EIA Regulations 2017, which states that the ES should include "a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment". It was not part of the claimant's case that there had been a failure to comply with this requirement.

Decision

218 I refer to paras 15–24 above for the factual background, including site selection. At para 21, I referred to the National Grid "Note", dated June 2018, which assessed the options as follows:

"6.2 Connecting in the Bacton, Bradwell and Lowestoft areas on the coast, would require the extension of the National Grid transmission network out to the coast in addition to the construction of a new National Grid substation. A new double circuit overhead line, at minimum, from the existing 400kV network out to the coast across Norfolk, Essex or Suffolk—this would carry significant consenting and environmental challenges. Identifying route options, consulting about those, obtaining consent for them and then building new transmission lines would be environmentally challenging and would not be deliverable within the timescales the wind farms are looking to connect. For these reasons, connecting in the Bacton, Bradwell or Lowestoft areas was discounted.

"6.3 Options to connect to the transmission network in North Norfolk, near Brandon, Shipdham, Dereham, Necton, Little Dunham, Kings Lynn or Walpole, were parked in the assessment, as other options compared more favourably in environmental and cost terms. [Footnote 4: 'Parked' means that the option is not subject to further analysis as there are better alternative options which have a similar system impact.

A It can still be reconsidered if the alternative(s) were later discounted due to reasons that are not affecting the parked options.] Each of these parked options would require much longer OFTO connecting cables in addition to new National Grid substations, with resultant greater environmental impacts and costs, as they are further from the offshore wind farms compared to other options.

B "6.4 Options to connect at Eye/Diss in Norfolk were similarly parked because of the longer distance. Those locations are further inland giving rise to greater environmental impact and cost associated with running OFTO cables from the wind farms to that location.

"6.5 A connection at Norwich Main would require the extension of the existing substation and a new overhead transmission line from Pelham on the Hertfordshire/Essex border to Necton in Norfolk.
C The OFTO cables would also need to either navigate through the Norfolk Broads or north around the Norwich conurbation, to reach Norwich Main, with high consenting risks and a longer route than other connection options. There are also multiple offshore conservation zones between the wind farm and land falls towards Norwich.

"6.6 Bramford was originally selected as the grid connection point
D for the East Anglia ONE offshore wind farm and two future East Anglia offshore projects. The onshore cable corridor for these projects was consented under the East Anglia ONE DCO consent. Following a design review of the East Anglia offshore projects (including the cable technology to be used to make the East Anglia ONE grid connection), it is only possible to accommodate the grid connections for East Anglia ONE and East Anglia THREE within the consented cable corridor. Any
E further connection at Bramford would require new cable routes to be developed and constructed.

"6.7 The assessment initially indicated that connecting at Sizewell is the preferred option. This would have required the extension of the existing substation. However the substation is within the nuclear security perimeter zone, requiring the option to be under the rules of
F Civil Nuclear Constabulary. In addition to that, the potential site is highly constrained both physically and environmentally. Connecting there is therefore unlikely to be achievable.

"6.8 A connection in the Leiston area is close to Sizewell and the coast, avoiding a longer cable route penetrating further inland through Suffolk to Bramford or elsewhere on the transmission network. A short cable route means the interaction between the project and other parties,
G such as crossings, protected areas and settlements, can be minimised.

"6.9 For these reasons, when considering connections efficiency, co-ordination, economic and environmental impacts, the Leiston area compares more favourably than other connection options and forms the basis of the connection offers for the East Anglia ONE North and East Anglia TWO projects."

H

219 Site selection was considered in detail by the ExA in ER Chapter 25. It considered the issues and evidence, in particular, whether the site at Bramford or Broom Covert, near Sizewell, offered viable connection alternatives. For example, at ER 25.4.1, the ExA recorded the information that National Grid had decided not to offer the Bramford substation as

an option for grid connection and referred to site selection work within discrete topic areas such as onshore historic environment and biodiversity. At ER 25.3.12–25.3.14, it explained why the Broom Covert option had not been pursued further. In the ExA's view, the applicants' site selection process was "compliant with policy and has led to a broadly deliverable Proposed Development" (ER 25.2.6).

220 At ER 25.5.8, the ExA recognised that it was not its role to second-guess the judgment of the applicants or the NGET in the siting of transmission infrastructure and that equally, their choices were at their own risk. It went on to say, at ER 25.5.9:

> "It is clear that the ExA is not 'at large' in the territory of alternatives. The ExA must consider the merits of the application before it, including the consideration of alternatives with respect to the matters where they were relevant. It is sufficient in this respect to consider whether alternatives have as a matter of fact been appraised (and they have been)."

221 At ER 25.5.11, the ExA acknowledged the extent of "community concern and disquiet about the general adequacy of the site selection process that led to the selection of the Friston … location" but correctly observed that

> "that disquiet alone does not provide a basis under which the ExA may move at large and interrogate the adequacy of site selection processes and decisions about alternatives, other than provided for in law and policy … The adequacy of the selected site becomes a matter of the application of relevant legal and policy tests and then for the planning balance in due course".

222 At ER 25.5.12, the ExA found that the legal and policy framework for the considerations of alternatives and site selection had been met.

223 At ER 25.2.5–25.2.6, the ExA had regard to the policy guidance in NPS EN-1, paragraph 4.4.3, to the effect that alternatives that were not main alternatives studied by the applicants, should only be considered to the extent that they were "important and relevant" (section 104(2)(d) PA 2008) and that proposals that were vague or inchoate could be excluded on the grounds that they were not important and relevant. It undertook site examinations of further alternative sites which were suggested by interested parties at the examination but which had not been submitted to the applicants for appraisal, and notice had not been given to persons who would be affected if additional land was required. It concluded that those alternative sites were not "important and relevant" for the purposes of section 104(2)(d) PA 2008 and NPS EN-1. In my view, this was a lawful exercise of planning judgment.

224 The defendant considered the evidence relating to the alternative sites which had been appraised, at DL 26.10–26.11:

> "26.10 The ExA asked the Applicant about possible alternative sites raised in representations. The Applicant considered Bramford was unsuitable due to constraints of overhead lines, other undertakers' apparatus, areas required for planting for the East Anglia ONE and East Anglia THREE projects, the need for compulsory acquisition, pinch points along the route passing through three designated sites and the cost of the longer route using AC technology, and that the

A solution proposed by SASES would not work as the limit (1320MW) was insufficient for both projects; Bradwell would require extension of an overhead line with consequent environmental, timetabling and consenting challenges; Old Leiston airfield and Harrow Lane, Theberton have problems associated with the proximity of nearby residential property, caravan park, Leiston Abbey and Theberton village, the openness of the landscape and views and the absence of screening [ER B 29.6.65]. The ExA was satisfied that these were not viable alternative sites [ER 29.5.146].

"26.11 The ExA investigated the possibility of an alternative grid connection at Broom Covert which was initially suggested by NNB Generation (SZC) Company Limited, but which subsequently stated the land is being used for translocation of reptiles from the construction of C the Sizewell C power station and was unavailable [ER 29.5.66 et seq]. Following queries from the ExA at Compulsory Acquisition Hearing 3 the Applicant explained that in July 2017 EDF Energy had advised that this land, or any land associated with the development of Sizewell C, was not available as it was allocated for ecological compensation and mitigation for reptiles, and the Applicant was satisfied that as EDF D was a statutory undertaker, coupled with the importance of the land to Sizewell C and EDF's need to protect the safety and security of Sizewell B power station meant the land was not available; it had also considered the matter following requests from ESC and SCC and concluded that the policy and consenting challenges outweighed the increased cost of further cabling to Grove Wood. The ExA was satisfied with the Applicant's response and concluded that compulsory acquisition of the E land to the west was necessary and proportionate [ER 29.5.69 et seq]. The ExA concluded Broom Covert was not a viable alternative [ER 29.5.146]."

225 Finally, the defendant agreed with the ExA's analysis and conclusions on alternative sites and site selection (DL 23.30).

F **226** In my judgment, the conclusions of the ExA and the defendant were a legitimate exercise of planning judgment which do not disclose any public law errors. In the light of their findings, there was no proper basis to refer the matter back for reconsideration by the National Grid.

227 The facts and circumstances of this case are clearly distinguishable from those in *Stonehenge* [2022] PTSR 74. *Stonehenge* was not a case about G alternative sites. It concerned a failure to take into account the relative merits of alternative tunnelling options at the site, which the court found were obviously material considerations, such that it was irrational not to take them into account. In this case, following the site selection process undertaken by the National Grid, and then the applicants, the ExA and the defendant have considered alternative sites in detail and reached rational conclusions upon the evidence before them. It is not possible to conclude that, on the H evidence, the ExA and the defendant have acted irrationally by failing to take into account any obviously material consideration. By concluding (at ER 25.2.6) that further alternative sites were not "important and relevant" under section 104(2)(d) PA 2008 and NPS EN-1, the ExA was, in effect, deciding that those sites were not obviously material considerations. This conclusion was not unlawful in the circumstances of this case.

228 Holgate J found that the relevant circumstances in *Stonehenge* were "wholly exceptional". Those circumstances included significantly adverse effects on heritage assets at a World Heritage Site that has "outstanding universal value" for the cultural heritage of the world. The circumstances at this site cannot be characterised as "wholly exceptional". The ExA's final summary of the total adverse impacts was "local harm [which] is substantial and should not be underestimated in effect" (ER 28.4.4). It was outweighed by the national benefits of providing highly significant renewable energy generation capacity.

229 Therefore, for the reasons set out above, ground 6 does not succeed.

Final conclusion

230 The claim for judicial review is dismissed, on all grounds.

Claim dismissed.

THOMAS BARNES, Solicitor